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CASES DETERMINED

IN THE

SUPREME COURT OF NEBRASKA

SEPTEMBER TERM, 1929.

CHARLES B. CALLAWAY, APPELLANT, V. FARMERS UNION COOPERATIVE ASSOCIATION OF FAIRBURY, APPELLEE.

FILED OCTOBER 3, 1929. No. 26680.

1. **Pleading:** VARIANCE. There can be no recovery if there is a material variance between the allegations and the proof. The *allegata* and *probata* must agree.
2. **Evidence** in the record examined, and *held* to sustain the action of the trial court in directing a verdict for defendant.

APPEAL from the district court for Jefferson county: WILLIAM J. MOSS, JUDGE. *Affirmed.*

J. A. Brunt and *Heasty, Barnes & Rain,* for appellant.

J. C. Hartigan and *A. C. Pancoast, contra.*

Heard before GOSS, C. J., DEAN, THOMPSON, EBERLY and DAY, JJ., and CHASE and REDICK, District Judges.

EBERLY, J.

This is an action by a member of a farmers union cooperative association against the association to recover a "patronage dividend" alleged to be due and payable to plaintiff. After issue joined there was a trial to the jury, at the close of which the district court directed a verdict for the defendant, and from this verdict and the judgment of dismissal entered therein, plaintiff prosecutes this appeal.

Summarizing, the gist of plaintiff's petition is that he has been continuously a member of the defendant association since 1919 and is such at the present time; that he

transacted business with the defendant during the year ending June, 1926, amounting to $24,000. "Plaintiff further alleges that the by-laws provide for the holding of an annual meeting of said association, and that said annual meeting shall be held in June of each year; that a business year of said association shall be from one annual meeting to the next; that profits are prorated at the annual meeting on business done during the year preceding the annual meeting;" that at the annual meeting in June, 1926, a "morata (patronage) dividend of 5 per cent. was earned and declared to the stockholders;" that payment of this dividend so declared has been wrongfully refused to him, though due demand therefor has been made upon the defendant association. To this petition the defendant demurred, for the reason that "the petition does not state facts sufficient to constitute a cause of action." The demurrer was overruled. The defendant then answered by a general denial.

It is to be noted that plaintiff in his petition does not expressly, or by necessary implication, allege that the "patronage dividend" for which he sued was declared by the board of directors. This would seem to follow as the necessary inference from the statements of his petition relating thereto, in connection with the by-laws pleaded, that "profits are prorated at the annual meeting (of defendant association) on business done during the year preceding the annual meeting," and "that at the annual meeting (of the stockholders) in June, 1926," a *pro rata* "dividend of 5 per cent. was earned and declared to the stockholders on the value of business transacted with the corporation for the business year."

It is the generally accepted doctrine that, in the absence of other authority, it is the duty of the board of directors, and not of the stockholders, to determine whether or not a dividend shall be declared, but there is authority for the proposition that stockholders may, however, act in conjunction with directors in the declaration of dividends, or the same result may be accomplished by the unanimous ac-

tion of all of the stockholders. 7 Thompson, Corporations (3d ed.) sec. 5273.

Giving the plaintiff's petition this liberal construction, what are the proofs in the record to sustain its allegations?

Plaintiff offered in evidence a copy of the minutes of a "called meeting" of the directors of the Farmers Union Cooperative Association held in Fairbury, on the 3d day of June, 1926, there being five members of the board present. This record was received over objection and disclosed that this board of directors at that meeting declared a "patronage dividend of 2/10 per cent. on live stock and 5 per cent. on grain and coal and merchandise." It will be noted that this cannot be termed an annual meeting; that the only annual meeting provided for by the by-laws, a copy of which is in evidence, is the "annual meeting" of the stockholders of the association. But plaintiff did introduce, as exhibit 5, the minutes of the annual meeting of the stockholders of this association held at the courthouse at Fairbury, Nebraska, June 16, 1926. The following constitutes a true copy thereof:

"Courthouse, Fairbury, Nebr. June 16, 1926.

"The stockholders of Farmers Co-op Ass'n met in their regular annual meeting on June 16, 1926. The meeting was called to order by the President Mr. F. S. Wells at 8:30 p. m. Minutes of the meeting of June 16, 1925, were read and approved. Manager report read and approved and showed a net gain to be $5,576.47.

"Omer Burd, Sec."

In connection with this subject the defendant introduced exhibit B, which is the minutes of a "called meeting" of the board of directors of the Farmers Union Cooperative Association held in Fairbury on the 16th day of June, 1926, at 9:30 a. m. A copy of these minutes is as follows:

"Farmers Union Co-op Ass'n, Fairbury, Nebr.

"At a called meeting of the board of directors of the Farmers Union Co-op Ass'n held in Fairbury on the 16th day of June, 1926, at 9:30 a. m. There being all members of the board of directors present. Meeting called to order

by Pres. Wells. On motion by W. C. Ware seconded by John Schoenrock that we reconsider and rescind the action of the board declaring a patronage dividend. Motion carried. Motion made that the earnings of the corporation now undistributed be carried to the surplus account of the corporation for the purpose of replacement and reserve. Motion carried.

"Omer Burd, Sec."

It is quite apparent that this evidence wholly fails to substantiate plaintiff's claim that in the June, 1926, annual meeting of the stockholders any dividend was declared and ordered to be paid either by the stockholders as such or the stockholders acting in conjunction with the board of directors. Indeed, the conclusion is inevitable that in the June 16, 1926, meeting the only business transacted was the convening of the stockholders; the calling of the meeting to order at 8:30 p. m.; the reading and approval of the minutes of the meeting of June 16, 1925; the reading and approval of the manager's report. We can only conclude from the absence of any reference to the subject of dividends in the minutes of this annual meeting of the stockholders heretofore set out, as well as a total lack of other competent evidence in the record establishing the affirmative, that there was no consideration of or action taken by the stockholders at this annual meeting on the subject of dividends whatever. It was a subject that did not enter into or form any part of the business transacted at that time. In view of these facts, the rule of law applicable to the situation before us is that "there can be no recovery if there is a material variance between the allegations and the proof. The *allegata* and *probata* must agree." *Elliott v. Carter White-Lead Co.*, 53 Neb. 458; *Cockins v. Bank of Alma*, 84 Neb. 624. And, as applied to the instant case, the plaintiff's petition cannot be sustained for want of proof. But should we liberalize the rule of construction applicable to plaintiff's petition to the extent that it might be held by implication to include an allegation that the dividend in suit was actually determined, ordered and declared by the board

of directors of defendant (a construction which, in view of the demurrer in the record, and the continued and consistent objection of defendant to the admission of plaintiff's evidence, would be unwarranted), still, there is no sufficient evidence in the record before us upon which a judgment in his favor could be sustained. As already appears, at a called meeting of the directors of the Farmers Union Cooperative Association held in Fairbury on the 3d day of June, 1926, there being five members only of the board present, a resolution was adopted to the effect "that we declare a patronage dividend of 2/10 per cent. on live stock and 5 per cent. on grain and coal and merchandise." But it also appears that at a called meeting of the board of directors of the Farmers Union Cooperative Association held in Fairbury on the 16th day of June, 1926, at 9:30 a. m., there being all members of the board of directors present, the action of this board of June 3d declaring a patronage dividend was reconsidered and rescinded and the earnings of the corporation then undistributed were directed to be carried to the surplus account of the corporation for the purpose of replacement and reserve. Following this last action by the board of directors, there was held the annual meeting of the stockholders of the Farmers Union Cooperative Association, which convened at 8:30 p. m. on the same day, approved the minutes of the previous annual meeting, heard and approved the manager's report, and adjourned.

Under the facts disclosed by the record, was the board of directors in its meeting on June 16, 1926, justified and empowered in reconsidering and rescinding the action of the same board taken on the 3d of June previously? This corporation had been in existence since 1919. Sections 1 and 2 of article 7 of the by-laws in force since the date of its organization provided:

"Section 1. Out of the proceeds of the business the operating expenses and the interest on indebtedness shall first be paid.

"Section 2. Out of the profits there shall be set aside each year as a sinking fund 10 per cent. until such surplus

equals 50 per cent. of the paid-in capital; said sum to be used in payment for improvements and new buildings, to make up losses, and for such other purposes as the board of directors shall determine."

A compliance with these provisions would have resulted in the possession of a surplus by the defendant association of 50 per cent. of its capital stock. But no amounts whatever, in obedience to the provisions of the by-laws quoted, had been, up to that time, set aside as therein directed. Query: Was the action of the board of directors on June 3d directing and declaring a dividend, under the existing circumstances, lawfully possible, in view of the provisions of section 2 above quoted? Waiving the question last propounded, we find the acts of rescission of the board of directors of June 16 have ample support and authority in the by-laws of the defendant association. This organization had by the terms of its constating act, at the time of its organization, ample authority conferred by statute to make by-laws "for the management of its affairs and for the distribution of its earnings." In the exercise of this power thus conferred, it adopted a by-law which provides that 20 per cent. of the members may ask that a proposed measure (of the board of directors) "be submitted to the stockholders for approval or rejection. Upon the receipt of a petition containing the proposed measure and signed by such per cent. it shall be the duty of the president to call a special meeting of the stockholders," and that "at such special meeting a majority vote shall be sufficient to approve or reject the measure submitted to the meeting for approval or rejection." Whatever the individual opinion of the attorneys in this case may be or the members of this court possess concerning the value of the principle of the initiative and referendum as a political proposition, these by-laws having been adopted contemporaneously with the organization of the association, and thus forming an essential part of the membership contract, good faith demands their enforcement unless their provisions are contrary to law or in excess of the power conferred upon the associa-

tion. We find no reason that would justify our failure to give the provisions quoted full force and effect in the instant case. If they are to be deemed in force and applicable, it would follow that the term "proposed measure" used therein properly construed, in view of its commonly accepted definition, would embrace the subjects of proposed declarations of dividends and the application and disposition of corporate earnings by the board of directors. Therefore, the action of the board on the 3d day of June being expressly subject to revision or veto may not be deemed final or binding upon the corporation until the reasonable time for referendum and review has expired. If this power of referendum exists, it is our duty to construe it so as to make it effective. This by-law also provides that "if the measure is approved it shall go into effect at once." This language implies that until the time for referendum has elapsed the action taken is not in effect. Therefore, no rights are or can be created by or through it against the corporation until this "reasonable time" has expired.

It would also follow that until the action taken by the board of directors is in effect or has created new rights against the corporation it may be rescinded or modified by the corporate agency involved. This was lawfully done in the instant case when the entire board of directors on the 16th of June reconsidered and rescinded their previous action declaring a patronage dividend and made other and different disposition of the corporate earnings of defendant.

It must also be remembered that this act of rescission was likewise subject to revision under the terms of the by-laws referred to, but, so far as the record discloses, no action thereon has been taken from which it might, if necessary, be inferred that the last action was in accord with the desires of the stockholders in whom the by-laws vest supreme control.

In view of the circumstances referred to, the action of the board of directors on June 3d not being final, but subject to revision and rejection, and having actually been rescinded within a reasonable time, the principle, which would apply

in cases where the board is the actual and final arbitrator in whom is vested the duty and discretion to determine whether or not a dividend shall be declared, has no application. So the conclusion follows that, even if the petition in the instant case be given the enlarged construction suggested, the facts would not entitle the plaintiff to the relief for which he prays.

The action of the trial court, therefore, in directing a verdict in favor of the defendant was correct and the judgment is

AFFIRMED.

HILMA C. WILLIAMS, APPELLEE, V. ELAM C. WILLIAMS, APPELLANT.

FILED OCTOBER 3, 1929. No. 26745.

1. Divorce: PROPERTY SETTLEMENT: MODIFICATION. Where the parties to an action for divorce have before the trial of such case entered into a contract for a property settlement and alimony payments and this contract is approved by the court, the same will not be set aside or modified, except upon a showing of fraud or such change in the circumstances of the parties as, in the opinion of the court, would require a change in the payments.
2. ———: ———: ———. Evidence examined and *held* to support the decree of the trial court, except that an item of insurance premiums, which, according to the contract, were paid for the benefit of the plaintiff, should be credited, under the contract, as part of the payments made to the plaintiff.

APPEAL from the district court for Douglas county: CHARLES LESLIE, JUDGE. *Affirmed as modified.*

Frank H. Woodland, for appellant.

A. C. R. Swenson and *R. E. Robinson, contra.*

Heard before GOSS, C. J., ROSE, GOOD and EBERLY, JJ., and REDICK and RYAN, District Judges.

RYAN, District Judge.

This is an appeal from an order of the district court for

Douglas county, refusing to modify the provisions of a divorce decree in regard to alimony. The decree was entered on September 26, 1924. The petition to modify was filed March 8, 1928, and was based primarily upon a claim that fraud was practiced upon the defendant in securing the contract of property settlement and alimony and the fact that the burden placed upon the defendant by the provisions for alimony was too heavy and that his income was decreasing. The provisions in regard to alimony were based upon a contract entered into some time in June, 1924, shortly before the trial of the original divorce suit. The divorce suit was brought by the plaintiff. It would serve no good purpose here to set out in detail the reasons for the separation of these parties. It is sufficient to say that it is admitted that the defendant had by his conduct with the woman who is now his wife given the plaintiff ample cause for divorce or separation and that the defendant himself had no cause of action for divorce.

It appears from the record that the plaintiff had consulted one Philip E. Horan, a practicing attorney in Omaha, and contemplated bringing a suit for separate maintenance and did not wish an absolute divorce. Mr. Horan was also the attorney for the company of which Mr. Williams, the defendant, was president. Mr. Horan took the matter up with Mr. Williams and, after some negotiations, a property settlement was agreed upon, a summary of which is as follows: First, payment to Mrs. Williams of $1,000 in cash and setting over to her the family home, worth about $6,000, and the family automobile. Second, payment of $250 a month to Mrs. Williams. Third, payment of $50 a month to Mrs. Williams for the support, maintenance and education of their minor son, Carlton, who was at that time eleven years of age; these payments to be increased to $60 a month when he should reach high school, and to $100 a month while he should be in college, and to cease upon the completion of his education. Fourth, payment by Mr. Williams of premiums on $10,000 of life insurance upon his life, payable to Mrs. Williams; these premiums amounting to

$245 a year. Fifth, the assignment of one-third of Mr. Williams' stock in the Williams-Murphy Company to the Omaha Trust Company, as trustee for Mrs. Williams, said stock to be paid to Mrs. Williams upon Mr. Williams' death, should he predecease her, but to be returned to Mr. Williams in case she predeceases him. Sixth, in case of reduction of Mr. Williams' income, total payments provided for by contract to be reduced so as not to exceed 40 per cent. of his earnings.

At the time of entering into this contract Mr. Williams owned 500 shares of stock in the Williams-Murphy Company, the value of which he estimated at $70 a share. In addition to this he had $14,000 in cash, which was loaned to the company, and he also owned a lot in the north part of Omaha, which he afterwards sold for $2,200. This property was in addition to the home and the automobile which he gave to his wife.

The Williams-Murphy Company is a wholesale grocery concern. It appears from the record that there is no income or dividends paid upon the stock, but that all the earnings of the company are used in the payment of salaries, so that, aside from his salary, Mr. Williams has no other income. At the time of the divorce his salary was $10,000 a year. A little less than two years after the divorce decree was entered Mr. Williams' salary was reduced to $7,500 a year, so that, under the sixth provision of the above summary of the contract, the payments for the support and education of the minor son ceased and his payments amounted to only $250 a month. The record also shows that, in addition to the payments of $250 a month, Mr. Williams has kept up the premiums on the life insurance policy in the sum of $245 a year. A short time before the commencement of this action in the district court Mr. Williams attempted to have the contract for a property settlement construed so as to include the $245 insurance premiums within the limitation providing the total payments should not exceed 40 per cent. of his income, but this was denied him by the trial court.

The principal ground for modification urged by the appellant in his petition in the district court and in his brief filed in this court is that a fraud was practiced upon him by Mr. Horan, the plaintiff's attorney, and he alleges that he protested to said Horan against such large payments each month, continuing over an indefinite period and terminating only upon plaintiff's death or her remarriage, and that said Horan advised him that if he did not consent to such a provision the court would in its divorce decree require him to pay a sum of money as permanent alimony, the income of which would approximate the sum of $250 a month, which said sum this petitioner could not pay, and that, acting upon this advice, he signed the contract above referred to. At that time it appears also from the record that the plaintiff intended to file suit for separate maintenance and did not wish an absolute divorce, and that a part of the consideration for the defendant's agreeing to the property settlement was her agreement to bring suit for an absolute divorce. Since the divorce the defendant has remarried, built a new and expensive home and his living expenses have greatly increased.

The trial court found that no fraud was perpetrated upon the defendant, inducing him to enter upon the property settlement agreed upon between plaintiff and defendant herein, prior to the commencement of the divorce action, and that the terms of the property settlement were reasonable under the circumstances of the case; that the reduction in the defendant's salary does not justify a modification of said settlement and the decree confirming the same, in view of the provision in such settlement limiting payments by the defendant to the plaintiff and the minor child of plaintiff and defendant to 40 per cent. of defendant's income, and the court further found that the increased expenditures incurred by the defendant, subsequent to the divorce decree and his subsequent remarriage, do not justify any modification of the terms of said decree.

We are satisfied, from a careful reading of the record, that there was no fraud practiced upon the defendant by the

plaintiff's former attorney. The appellant, however, contends that, under the decisions of this court, it is not proper to allow alimony in continuing monthly or annual instalments throughout the lifetime of a wife, and cites *Cochran v. Cochran*, 42 Neb. 612, and *McGechie v. McGechie*, 43 Neb. 523, in support of that doctrine. Those are both early cases, and in the later case of *Chapman v. Chapman*, 74 Neb. 388, which was decided more than ten years later, this court criticized the decisions in the above cases in this language: "That practice (referring to the practice of allowing a lump sum as alimony, rather than continuing payments) was sanctioned and the contrary course disapproved by this court in *Cochran v. Cochran*, 42 Neb. 612, and *McGechie v. McGechie*, 43 Neb. 523, but we think without mature or adequate deliberation."

Moreover, we have in this case the additional feature of a contract entered into as a basis of a property settlement, and, in this connection, it is well to note that the defendant's principal asset was his earning capacity. He did not have any substantial amount of property, out of which a full judgment for alimony could be paid. He was anxious that the plaintiff sue for an absolute divorce, rather than follow out her intentions and ask for separate maintenance only, and, judging from his conduct, no doubt this was in a large part the consideration for him making a fairly generous provision for the plaintiff. Whether or not the defendant consulted any attorney other than Mr. Horan, the record shows that he was quite capable of taking care of his rights. It was at his insistence that the 40 per cent. limitation was inserted in the contract. He procured a reduction of the cash payment to be made by him; he procured a reduction in the amount of the monthly payments to be made by him for the benefit of his son, Carlton; and there is nothing in the record to indicate in any way that he signed the contract as the result of any fraud or misrepresentation practiced upon him.

The defendant, it is true, does not appear to be as prosperous as he once was. This is accounted for by two cir-

cumstances: His income has been reduced to the extent of $2,500 a year, and, in addition to the alimony payments which he is required to make, he has increased his living expenses considerably. As soon as the statutory six months' period had expired, the defendant remarried. He built a new home in an exclusive residential district of Omaha, at a total cost, inclusive of the lot, of about $22,000, in contrast with the $6,000 home which was set aside to the plaintiff. In order to provide this new home, it was necessary for him to borrow $10,000 upon it from a building and loan company, and the annual payments on this building and loan company mortgage amount to $1,200.

Appellant also cites several cases from other jurisdictions where alimony had been reduced on the ground that the defendant had remarried and had a second family to support, or partly upon that ground. In this regard we believe that, under the circumstances in this case and in similar cases, the first wife and family should have the first consideration, and we are unable to say, from all the circumstances in this case, that the contract, voluntarily entered into by the parties, is in any respect unreasonable or unjust. We do feel, however, that, under the provision contained in this contract that the total payments provided for by the contract should not exceed 40 per cent. of the defendant's income, the insurance premiums, which amount to $245 a year, should be included within the 40 per cent. limitation.

With this modification the decree of the district court is affirmed.

AFFIRMED AS MODIFIED.

MARGARITO GONZALEZ V. STATE OF NEBRASKA.

FILED OCTOBER 3, 1929. No. 27038.

1. **Contempt.** Summary proceedings for contempt of court will not lie except where the contempt is committed in the presence of the court and where the court has judicial cognizance of the facts constituting the contempt.
2. ———. Where it is necessary to adduce evidence to determine whether or not a contempt has been committed a formal com-

plaint must be filed and an opportunity given the accused to make a defense.

3. ———: JUDGMENT. A judgment of contempt must state the facts constituting the contempt, and a judgment which merely states the conclusion of the court will not sustain a sentence of imprisonment for contempt.

ERROR to the district court for Lancaster county: JEFFERSON H. BROADY, JUDGE. *Reversed.*

Dale P. Stough and *Sanden, Anderson & Gradwohl,* for plaintiff in error.

C. A. Sorensen, Attorney General, and *George W. Ayres, contra.*

Heard before GOSS, C. J., ROSE, GOOD, EBERLY and DAY, JJ., and REDICK and RYAN, District Judges.

RYAN, District Judge.

Margarito Gonzalez was found guilty of contempt of court in the district court for Lancaster county, and was sentenced to serve a term of thirty days in the county jail for that offense, and he brings the proceedings to this court for review upon petition in error.

The plaintiff in error was the plaintiff in an action brought in the district court for Lancaster county against the Chicago, Burlington & Quincy Railroad Company for damages. At the beginning of the trial of that suit an interpreter was requested for the plaintiff. There followed a discussion and inquiry as to the necessity for an interpreter, and the plaintiff in error was questioned at some length by the court as to his ability to speak and understand the English language. At the conclusion of this examination the court granted the request and an interpreter was sworn and the case proceeded.

At the close of the plaintiff's testimony the court directed a verdict for the defendant, and then proceeded to call several witnesses and examined them at length as to the plaintiff's ability to speak and understand the English language. At the conclusion of the examination the court entered this finding:

"Immediately upon disposal of causes of actions as above set forth, the court made full and complete examination of plaintiff and other witnesses upon the question of whether the plaintiff should not be held in contempt, in that he has deceived the court on his ability to understand English, both by hearing and understanding and also speaking the English language. On conclusion of such hearing the court held said Gonzalez in contempt of court and committed to jail for a period of thirty days."

Then follows the formal judgment and sentence for contempt. No other proceedings were had. No formal complaint was filed, accusing Gonzalez of any specific crime or of contempt. He was cited before the court immediately at the conclusion of the proceedings in the civil action, and all that is recited anywhere in the record is the mere conclusion that "he has deceived the court on his ability to understand English, both by hearing and understanding and also speaking the English language."

The law on the subject of contempt of court has been well settled by the previous decisions of this court and other courts in this country, and, after a careful consideration of the decisions of this court and others, we are convinced that the conviction cannot be sustained. *Beckett v. State,* 49 Neb. 210; *Crites v. State,* 74 Neb. 687; *O'Chander v. State,* 46 Neb. 10; *Wilcox v. State,* 46 Neb. 402; *People v. Stone,* 181 Ill. App. 475; *Riley v. Wallace,* 188 Ky. 471; *Ex parte Hudgings,* 249 U. S. 378; *Finegold v. State,* 112 Neb. 64.

The attorney general invokes the statutory power of a court to inflict punishment for a "wilful attempt to obstruct the proceedings, or hinder the due administration of justice," in an attempt to sustain the conviction. Comp. St. 1922, secs. 9189, 9190. But the record fails to show that the court acted or attempted to act under the authority contained in these provisions. Nowhere throughout the several pages of the proceedings does the expression appear, and in the record made on the motion to vacate the sentence there is no reference to any "attempt to obstruct the pro-

ceedings, or hinder the due administration of justice." The judgment of the court does not find that the defendant has attempted to "obstruct the proceedings, or hinder the due administration of justice," but states a mere conclusion of the court.

The record discloses that the trial court did not make the finding or impose the sentence as the result of facts of which it had judicial cognizance. The recitation is made that a "full and complete examination of the plaintiff and other witnesses" was had, and it was upon the evidence thus adduced and considered that the court determined the plaintiff in error was guilty of contempt of court.

In commenting upon a similar state of facts in a recent case this court said: "The record, therefore, is fatally defective and the action taken will not support the sentence imposed. If Finegold was not subject to summary punishment, a written complaint and an opportunity to make a defense were necessary to a conviction for contempt. If he was guilty of contempt in the presence of the court, his conviction should state the conduct constituting the contempt. In neither respect is there a compliance with the law." *Finegold v. State*, 112 Neb. 64.

The conviction cannot be sustained, and the judgment of the trial court is reversed and the cause remanded for further proceedings.

REVERSED.

THOMAS MURRAY V. STATE OF NEBRASKA.

FILED OCTOBER 3, 1929. No. 26864.

1. **Criminal Law: PRELIMINARY EXAMINATION: PLEA IN ABATEMENT.** "When the quantity or sufficiency of the evidence to justify the holding of a person to answer for a crime in the district court is called in question by a plea in abatement, and it appears that there has been a preliminary hearing in form and substance, and that evidence has been introduced in support of

the complaint such as to invoke an honest exercise of judgment or discretion * * * as to the order or judgment to be entered, and from which a fair legal deduction may be reached that a crime has been committed, and there is testimony tending to show that the accused committed the offense, and he is held to await trial in the district court, a preliminary examination has been had within the meaning of the statute, and the plea in abatement would be unavailing." *Jahnke v. State*, 68 Neb. 154. Evidence at the preliminary hearing in this case examined, and *held* to justify the order of commitment by which the defendant was required to answer the charge of forgery in the district court.

2. ———: JURY: CHALLENGE TO ARRAY. The laws of this state have imposed upon the sheriff certain duties, among which are the selection and summoning of juries, as well as guarding them during the trial and subsequent deliberations. In the absence of any showing of actual misconduct, or conduct inconsistent with his official duties, it will not be presumed that he had any such personal or private interest in the prosecution as would disqualify him from acting officially in the performance of all duties specifically enjoined upon him by the statute. The mere indorsement of the name of a sheriff as a proposed witness for the state on an information in a criminal case, where such sheriff is not thereafter called as a witness and where there is no evidence of any prejudice on his part against the defendant, will not justify the trial court in sustaining a challenge to the array of jurors on the ground that the sheriff was disqualified to select, summon and guard such jury.

3. ———: INTENT: PROOF. When it becomes necessary in a criminal prosecution to show a particular intent to establish the offense charged, proof of other acts of the same or similar kind is admissible for that purpose, when such proof shows such connection between the different transactions, in point of fact and time, as raises a fair inference of a common motive in each. To be admissible, such proof should be sufficiently significant in character and sufficiently near in point of time to have a tendency to persuade a reasonable man to belief in the intent or motive sought to be proved.

4. ———: EXPERT WITNESSES: QUALIFICATIONS. The question of the qualifications of an expert offered in court as a witness is a preliminary one for the court. The weight to be given his testimony is a question for the jury, under proper instructions by the court. It is the prevailing rule that the decision of the trial court on the question of the qualifications of an expert witness will not be disturbed unless there has been a clear abuse

of discretion. *Held,* no error in the ruling of the trial court in the instant case.

5. ———: FAILURE OF ACCUSED TO TESTIFY: INSTRUCTIONS. Where, in a criminal prosecution, a defendant does not testify in his own behalf, it is not reversible error for the trial court to mention such neglect or omission in its instructions, when followed in the same connection with the direction that "nothing must be taken against him because he had not so testified." *Ferguson v. State,* 52 Neb. 432.

6. ———: NEW TRIAL. Whether a motion for a new trial in a criminal case, based upon alleged misconduct of jurors, should be sustained rests in the sound discretion of the trial court, and its ruling on such motion will not be disturbed unless an abuse of discretion is shown. *Simmons v. State,* 111 Neb. 644. Evidence on the question of alleged misconduct of jurors in the instant case examined, and *held* sufficient to establish the purity of the verdict.

7. Forgery: SUFFICIENCY OF EVIDENCE. The whole evidence, outlined and discussed in the opinion, *held* to point with such unerring certainty to the accused as the perpetrator of the crime charged as to fully sustain the verdict of guilty returned by the jury in this case.

ERROR to the district court for Otoe county: JAMES T. BEGLEY, JUDGE. *Affirmed.*

Bertrand V. Tibbels and *Eugene D. O'Sullivan,* for plaintiff in error.

C. A. Sorensen, Attorney General, and *Homer L. Kyle, contra.*

Heard before GOSS, C. J., ROSE, DEAN, GOOD and EBERLY, JJ., and REDICK and STEWART, District Judges.

STEWART, District Judge.

In the district court for Otoe county, one Thomas Murray, hereafter called the defendant, was prosecuted on an information containing three counts. In the first count he is charged with unlawfully and feloniously forging a promissory note for $5,000, purporting to be signed by one Henry Kasbohm. The second count charged him with uttering such forged note with intent to defraud; while the third count charged him with wilfully and unlawfully hav-

ing such forged note in his possession for the purpose of selling and disposing of it with intent to defraud. The trial resulted in a verdict of guilty on all counts. After overruling the defendant's motion for a new trial, the court sentenced him to an indeterminate term of from five to ten years in the penitentiary on the first and second counts, and one to ten years on the third count, together with a fine of $100 and costs of prosecution, sentences to run concurrently.

In this case, the petition in error contains 43 assignments of alleged error. In defendant's printed brief, these are reduced to 12 in number, all of which are presented and argued in 10 propositions of law. Only those which are argued in brief of counsel will be considered.

The accused first contends that the trial court erred in overruling his plea in abatement, based upon the insufficiency of the preliminary hearing. More definitely stated, his complaint is that the evidence offered by the state at the preliminary examination was insufficient to warrant the order of commitment by which he was held for trial in the district court. What we conceive to be the correct rule by which to determine the sufficiency of the evidence to justify holding the accused to answer for a crime in the district court is clearly stated by Holcomb, J., in the case of *Jahnke v. State*, 68 Neb. 154.

"When the quantity or sufficiency of the evidence to justify the holding of a person to answer for a crime in the district court is called in question by a plea in abatement, and it appears that there has been a preliminary hearing in form and substance, and that evidence has been introduced in support of the complaint such as to invoke an honest exercise of judgment or discretion * * * as to the order or judgment to be entered, and from which a fair legal deduction may be reached that a crime has been committed, and there is testimony tending to show that the accused committed the offense, and he is held to await trial in the ment would be unavailing."

district court, a preliminary examination has been had within the meaning of the statute, and the plea in abate-

In this case, the record shows that a preliminary hearing was had before the county judge, sitting as a committing magistrate. The state relied upon the testimony of two witnesses. Kasbohm, whose purported signature appeared on the promissory note in question, testified that it was not his signature and that he never authorized it. This was the appropriate proof of forgery, and, in the absence of countervailing evidence, was sufficient to establish the crime of forgery. The state then called the witness Robert O. Marnell, who testified that he was the cashier of the Merchants National Bank of Nebraska City to whom the alleged note was drawn; that he knew the defendant; had transacted business with him and with his bank, and that he knew the handwriting of the defendant. He further testified that he received the note in question and that it was accompanied by a letter in the handwriting of the defendant. It is true, as argued by counsel, that the letter of transmittal was not signed by the defendant and, in fact, was a printed form of transmittal slip evidently used by the defendant's bank for the transmitting of various items of exchange. However, this slip did contain certain written names and figures and these, no doubt, were the indications upon which the witness based his opinion that the handwriting was that of the defendant. The defendant offered no testimony. Thus, it appeared from the record before the magistrate that a forgery had been committed and that the forged instrument was in the possession of the defendant, unexplained. Here was the time and place for the defendant to speak, if by any explanation he could destroy the damaging inferences arising from the state's evidence. The hearing was for his benefit. We conclude that the evidence offered by the state at the preliminary examination in this case meets all the requirements of the rule announced in the *Jahnke* case; that it fully justified the order of commitment by which the defendant was required to answer the charge of forgery in the district court, and that his plea in abatement was properly overruled by the trial court.

It is next urged that the trial court erred in overruling defendant's challenge to the second array of jurors, based upon the fact that the panel was selected and summoned by one Carl Ryder, sheriff of Otoe county, who, it is claimed, was a material witness for the state and prejudiced against the defendant. The record shows that the sheriff was never called as a witness in this case. The county attorney, in his testimony, says that the name of the sheriff was indorsed on the information in pursuance of a custom established by his office, whereby the names of various court officials were indorsed in every prosecution as a precautionary measure; that the sheriff was not a material witness for the state and that he never had any intention of calling him. Upon motion of the county attorney, the name of the sheriff was ordered stricken from the information. No evidence appears in the record which in any way supports the charge that the sheriff bore any malice toward the defendant, or that he was guilty of any misconduct in his relations with the jury at any time. The laws of this state have imposed upon the sheriff certain duties, among which are the selection and summoning of juries, as well as guarding them during the trial and subsequent deliberations. In the absence of any showing of actual misconduct, or conduct inconsistent with his official duties, it will not be presumed that he had any such personal or private interest in the prosecution as would disqualify him from acting officially in the performance of all duties specifically enjoined upon him by the statute. Very recently this court considered the subject in the case of *Noonan v. State*, 117 Neb. 520. In this case, Judge Eberly, speaking for the court, announced the following rule:

"A sheriff who is not the prosecuting witness nor the sole witness in a criminal case, but whose evidence is affirmatively shown by the record to be corroborative merely, is not, by the fact that he is called as a witness and his name, as such, is indorsed upon the information charging the offense being tried, disqualified thereby from performing the duties of his office; nor do these facts render a panel

of jurors selected and summoned by him, under direction of the district court as provided by section 9078, Comp. St. 1922, vulnerable to challenge."

We find no error in the overruling of the defendant's challenge to the second array of jurors.

Further, objection is made by the defendant to the court's ruling on certain evidence offered through the witnesses Kasbohm and Shane. We shall first consider the testimony of the witness Kasbohm.

Exhibit No. 66 was a letter written by the defendant to his cousin on March 24, 1927, containing a list of what purported to be accommodation notes, including the note which is the basis of this prosecution. Included in this list are two other notes, each for $5,000, said by Murray to have been signed by Kasbohm. Over objection of the defendant, the witness was permitted to testify that he never signed nor authorized the signing of any note such as the three referred to in this exhibit. It is insisted that this ruling resulted in the admission of evidence tending to establish one crime in the prosecution of another.

The defendant, by his plea of not guilty, put in issue everything which it was incumbent upon the state to prove under the information filed in this case. Guilty knowledge and intent were elements of the offense charged. It is in proof of these facts that the courts have gone farthest in admitting facts apparently collateral to the issue. Frequently motive and intent can be proved in no other way. The state in this case, by showing the note in the possession of the defendant, together with evidence that it was a forgery, presented some proof from which intent and guilty knowledge on the part of the defendant might rationally have been inferred. We know of no rule of law which precludes the state from offering additional competent corroborative proof. The single circumstance of defendant's possession of such an instrument might possibly leave in doubt the secret intent and motive of the defendant. When viewed in connection with the other evidence disclosed by exhibit No. 66, and it was made to appear that at about the

same time the defendant had in his possession two other notes by the same man and the genuineness of which was being denied, it might well be said that the evidence objected to by the defendant was the most appropriate kind of proof and effectually removed all doubt and uncertainty as to the true intent of the defendant in the transaction relating to the note in question. When it becomes necessary in a criminal prosecution to show a particular intent to establish the offense charged, proof of other acts of the same or similar kind is admissible for that purpose, when such proof shows such connection between the different transactions, in point of fact and time, as raises a fair inference of a common motive in each. To be admissible, such proof should be sufficiently significant in character and sufficiently near in point of time to have a tendency to persuade a reasonable man to belief in the intent or motive sought to be proved.

Further complaint is made that the court, over objection of the defendant, permitted the witness Shane to give his opinion regarding the authorship of the note in question. The witness was offered by the state as an expert on handwriting. The defendant insists that he was not properly qualified as an expert and devotes much time to criticism of his testimony. The question of the qualification of an expert offered in court as a witness is a preliminary one for the court to determine. The weight to be given his testimony is a question for the jury, under proper instructions by the court. The trial court was evidently satisfied with the foundation for this testimony, and it is the prevailing rule that the decision of the trial court on the question of the qualification of an expert witness will not be disturbed by the reviewing court unless there has been a clear abuse of discretion. We find no such abuse of discretion in the instant case. Counsel for defendant in their brief have said much about the method by which this witness reached his final conclusions. This was a matter affording proper subject for cross-examination of the witness, but went only to his credibility and the weight to be given to his testimony.

The next assignment of error relates to instruction No. 11, given by the court on its own motion, which is as follows:

"You are instructed that the defendant has not testified in his own behalf in this case, as he had a lawful right to do. Nothing must be taken against him because he has not so testified."

This identical instruction has been considered by this court in the case of *Ferguson v. State*, 52 Neb. 432, and it was there held that the giving of such an instruction is not reversible error. Defendant points out that this instruction violates section 10139, Comp. St. 1922. This statute was given full consideration by this court in the case last above referred to and we are heartily in accord with the views there expressed. The instruction given by the court in this case was a cautionary instruction given for the benefit of the defendant and designed to prevent the jury from indulging any inferences prejudicial to him from the fact that he did not give testimony in his own behalf. If there is any real ambiguity in the first sentence of the instruction, the last certainly removes all uncertainty as to the meaning the court conveyed to the jury. It may further be said that, if the defendant was not satisfied with the form or substance of this instruction, another should have been tendered the trial court as a requested instruction. We see no merit in this objection.

The next assignment of error presented by this appeal relates to the manner in which the jury were guarded in the closing hours of the trial, after the case had been finally submitted to them. Defendant complains that, after the jury retired to deliberate, they were not kept together as the law requires, but were permitted to separate in different rooms at the hotel on the last night before the verdict was returned. It is pointed out that, under the decisions in this state, a presumption of prejudice arises by reason of a separation of the jury, and that the state in this case has failed to present sufficient competent proof to establish the purity of the verdict. It appears from the record that the

jury were permitted to occupy separate rooms at the hotel during at least the last night of their deliberation. Evidence as to what actually occurred was offered and considered by the trial court on the hearing of the motion for a new trial and is preserved in the bill of exceptions. We have examined all this evidence with great care and we fail to find the testimony of a single witness which even tends to support any charge that any member of the jury at any time was in contact with any improper influence of any kind. Affirmative proof was offered by the state that nothing improper took place during the separation; that at no time was the jury subjected to any outside influence, and that the verdict was arrived at upon the consideration of the evidence only, and that no fact other than such as were adduced at the trial was considered by the jury. This proof was furnished in the form of affidavits by nine of the jurors who participated in the verdict. It is insisted by the defendant's counsel that these facts were not satisfactorily established by this showing. Under the rule established in this state, these are matters resting in the sound discretion of the trial court. Upon all the evidence submitted at the hearing on the motion for a new trial, the court below failed to find sufficient evidence of misconduct or prejudice to warrant the granting of a new trial, and in this finding we fully concur. In an opinion written by Judge Good in the case of *Simmons v. State*, 111 Neb. 644, this court has announced the following rule:

"Whether a motion for a new trial in a criminal case, based on alleged misconduct of jurors, should be sustained rests in the sound discretion of the trial court, and its ruling on such motion will not be disturbed unless an abuse of discretion is shown."

By appropriate assignment of error, the defendant finally presents to this court the question of the sufficiency of the evidence to sustain this conviction. Viewing the testimony as a whole, we find it sufficient in every way to establish the guilt of the defendant beyond a reasonable doubt. In fact, the verdict of the jury in this case is the only verdict which

should have been returned on the evidence submitted. It is true that the state has relied to some extent upon circumstantial evidence in the proof of material facts necessary to sustain a conviction, but in every such instance the facts and circumstances tending to connect the accused with the crime charged are of such persuasive nature as to exclude, to a moral certainty, every hypothesis except that of his guilt. Reference has already been made to the testimony of the witnesses Kasbohm, Marnell, and Shane. The legal deductions warranted by this proof are too apparent to require extended discussion here. However, other facts and circumstances disclosed by the record point with unerring certainty to the defendant as the perpetrator of this crime. We shall make brief reference to some of these. It appears from the evidence that the defendant for a number of years was the president of the Dunbar State Bank and in active charge of its affairs, and that the complaining witness, Kasbohm, was a near-by farmer and customer of this bank; that for at least a year prior to the time this offense was committed his bank was in serious financial difficulty, and about March 14, 1927, he disappeared and was next heard from at Corpus Christi, Texas. From that point he wrote a letter to his cousin, living at or near Dunbar, under date March 24, 1927. It is hard to conceive of a letter more incriminating in its nature, when considered in its natural and proper relation to other facts established in this prosecution. The letter is too long to warrant its full reproduction here, but we feel that specific reference to certain parts of it is entirely justified and wholly pertinent. In this letter, the defendant gives his cousin a list of what he calls accommodation notes, among which are three notes of $5,000 each, purporting to be signed by Kasbohm. With reference to these he writes to his cousin as follows:

"I had to get this money to keep things going and if there is any way at all that you can get the two due this month renewed without letting Kasbohm or J. P. Baker know, wish you would. You will find the amount of the Kasbohm notes to my credit as Special and Trustee $10,000 and

$5,000. The others have the excess loans, etc., to take care of them."

Other important statements appearing in the letter follow:

"You will find everything in my box in an envelope addressed to you—which will explain everything. Believe if you could get Henry & Earl to put enough money into the bank to pay for my stock you could continue to charge off those from loans that we don't expect to get anything out of. Hope you can arrange it some way so you can continue. I have worried my head off for more than a year but looks like no other recourse now. Wish you would try and keep this to yourself as much as possible and see if you cannot arrange things so that the bank can run. I expect to go south somewhere for the present but some time you may hear from me. God knows how I have prayed that this might be averted but seems to no avail. As for my family it is worst of all but you can help Lou to dispose of the home and advise her to go out to her Uncle Jno. Barsley in Wash. as she has so often said she would like to go there. I don't remember anything else now but if I should will write you again. Try and keep this all to yourself if possible. I am going to say farewell wish you success. Don't know how far I will go south as I don't have much money, but am going to strike a job at something. I am lost for the present and keep it to yourself."

This letter was signed "Your Cousin Tom" and contains other statements fully as significant as those quoted. It will be remembered that Kasbohm in his testimony denied ever signing or authorizing any note such as those referred to in this letter, and an audit by an examiner for the guaranty fund commission reveals that the note register of the Dunbar State Bank shows no loan of $5,000 to Kasbohm and contains no record of any such note. The records of that bank do show that the defendant's bank received a credit from the Merchants National Bank of $5,000 on the alleged forged note.

To us, further discussion of the evidence in this case

seems unnecessary. The verdict of the jury is fully sustained by the evidence, and the trial court properly overruled defendant's motion for a new trial on this ground.

On a careful examination of the entire record in this case, we find no error prejudicial to the substantial rights of the defendant, and the judgment of conviction is accordingly

AFFIRMED.

Note—Jury, 16 R. C. L. 246; R. C. L. Perm. Supp. 4067; 35 C. J. sec. 209 n. 91.

YELLOW CAB & BAGGAGE COMPANY, APPELLANT, V. COUNTY BOARD OF EQUALIZATION OF DOUGLAS COUNTY, APPELLEE.

FILED OCTOBER 11, 1929. NO. 26796.

1. **Statutory Provision.** "All property in this state, not expressly exempt therefrom, shall be subject to taxation, and shall be valued and assessed at its actual value. 'Actual value,' as used in this act, shall mean its value in the market in the ordinary course of trade." Comp. St. 1922, sec. 5820.
2. **Evidence** examined, tangible values fixed at same amount as in the district court and judgment affirmed.

APPEAL from the district court for Douglas county: WILLIAM G. HASTINGS, JUDGE. *Affirmed.*

John A. McKenzie, for appellant.

Henry J. Beal and *W. W. Slabaugh, contra.*

Heard before GOSS, C. J., DEAN, GOOD, THOMPSON, EBERLY and DAY, JJ., and REDICK, District Judge.

GOSS, C. J.

For 1928 taxes, appellant listed its 107 cabs and 18 trucks with the county assessor at $45,299, and listed other tangible property at $3,279. On notice and hearing the board of equalization of Douglas county raised the total taxable value to $120,000. Plaintiff appealed and, after a hearing, the district court fixed the total valuation of the tangible property at $80,570.17. Plaintiff appealed to this court.

"All property in this state, not expressly exempt therefrom, shall be subject to taxation, and shall be valued and assessed at its actual value. 'Actual value,' as used in this act, shall mean its value in the market in the ordinary course of trade." Comp. St. 1922, sec. 5820.

Quite a substantial part of the items as fixed by the decree below are not attacked. For some of the cabs in controversy the evidence does not definitely show a market value in the ordinary course of trade because there was no real market for such cabs. It was therefore difficult for the trial court, and is likewise hard for us, to fix the actual value. We think, however, the fair deductions from the evidence, taking it from that received from both appellant and appellee, warrant the reduction made by the district court but do not require any lower valuations on this appeal. To enter into an extended discussion of the particular items of the evidence upon which we base our conclusion would unduly protract our opinion and would not be of value to the parties or to the profession.

For the reasons stated, the judgment of the district court is

AFFIRMED.

OMAHA ARMORY BUILDING COMPANY, APPELLEE, V. LUCIUS B. JOHNSON, AUDITOR, ET AL., APPELLANTS.

FILED OCTOBER 11, 1929. No. 26872.

1. **Militia**: LEASE OF ARMORY. The legislature having appropriated funds for an armory for the national guard, it thereupon became the duty of the adjutant general to enter into such lease as was reasonably necessary to provide such armory.
2. **States**: APPROPRIATION: DUTY OF AUDITOR. Under section 3358, Comp. St. 1922, the auditor is authorized and required on presentation of proper vouchers to draw his warrant on the general fund and against the appropriation made by the legislature for the support and maintenance of the national guard.
3. **Mandamus**: PUBLIC OFFICERS. "When the law imposes a duty upon a public officer to do an official act at a particular time, the obligation is, ordinarily, a continuing one, and the courts will,

when it is practicable, coerce performance after the appointed time has gone by." *State v. Cornell*, 60 Neb. 694.

APPEAL from the district court for Lancaster county: WILLARD E. STEWART, JUDGE. *Affirmed.*

C. A. Sorensen, Attorney General, George W. Ayres and *John P. Breen*, for appellants.

Hall, Cline & Williams, Brome, Thomas, Ramsey & McGuire and *Richard F. Stout, contra.*

Heard before GOSS, C. J., ROSE, DEAN, GOOD, THOMPSON, EBERLY and DAY, JJ.

DEAN, J.

This appeal is brought to this court in behalf of the state, by the secretary of state and state auditor, defendants herein, to obtain a reversal of a judgment for $750 rendered against the state in the district court for Lancaster county, in favor of the Omaha Armory Building Company as lessor, a nonprofit organization, hereinafter called the armory, for armory rent alleged to be due from the state and wholly unpaid. The secretary of state and the state auditor, hereinafter referred to as the defendants, disallowed the claim and refused to pay the rent, but, on appeal to the district court, the claim was held to be a lawful charge against the state and was allowed in full for armory rent incurred in 1927 for the months of May and June. And it is from the judgment so rendered that the defendants have appealed.

Following are substantially the material facts: February 1, 1925, the plaintiff armory company entered into a written lease with H. J. Paul, as the adjutant general of Nebraska, on behalf of the state, wherein and whereby the occupancy of an armory at Omaha was provided for the use of the units of the Nebraska national guard to the end that provision might be made for the care and protection of the United States property furnished to the state for national guard equipment. By the terms of the lease, the armory building company rented the premises to the state at a yearly rental

of $4,500, payable at the rate of $375 a month on the 15th day of each month. It was agreed that on February 15, 1925, payments were to begin. The monthly rentals were paid as they became due each month prior to May and June of 1927, and on June 8 and July 1, 1927, vouchers for the payment of rentals for May and June were filed by the armory.

Section 3305, Comp. St. 1922, provides that the adjutant general shall be head of the military department, but subordinate to the governor, and that he shall perform the duties of chief of the quartermaster corps, which includes taking care of all public property belonging to his department.

Section 3334, Comp. St. 1922, provides that all such public property, except that in use in the performance of military duty, shall be kept in armories or other properly designated places of deposit. And the following provision is made in section 3359, Comp. St. 1922:

"The adjutant general shall report to the legislature on or before the first day of each biennial session thereof the amount of funds required for the pay of officers and enlisted men, armory rent, and transportation, care of clothing, arms, equipments, and tentage; and for the purpose of rations, fuel, forage, and stationery; and the legislature may provide by an appropriation out of the state general fund a sufficient sum to meet the requirements of this chapter."

Under section 3358, Comp. St. 1922, the auditor is authorized and required on presentation of proper vouchers to draw his warrant on the general fund and against the appropriation made by the legislature for the support and maintenance of the national guard. In *State v. Cornell*, 60 Neb. 694, in an opinion by Sullivan, J., we held to the following proposition:

"When the law imposes a duty upon a public officer to do an official act at a particular time, the obligation is, ordinarily, a continuing one, and the courts will, when it is practicable, coerce performance after the appointed time has gone by." See, also, *State v. Burch*, 119 Wash. 1.

Defendants contend that the building in question was donated by the city of Omaha to the plaintiff for use by the state. But, as the trial court found, large sums of money were expended for repairing the building and altering it to make it suitable for armory purposes. This money was advanced by private citizens who were to be reimbursed from the accumulated rentals to be obtained through releasing the premises. In addition, the heating, lighting, and maintenance of the armory in proper condition for use by the armory company involved expenses which were burdens the plaintiff was compelled to bear and the only possible reimbursement was to be derived from the rental contract with the state.

The record discloses that the rental contract was entered into by the parties in the utmost good faith and with due regard to the interests of the state, and the reasonableness of the rental charges, in view of the accommodations furnished, has not been successfully challenged.

It is not questioned in this record that the building equipped and maintained by the plaintiff armory company, as pointed out, was actually occupied by the units of the Nebraska national guard of Omaha pursuant to orders from competent authority.

The trial court decreed that the defendants recognize the validity of the lease in suit and ordered that proper warrants be issued upon the state treasury for all further rentals to become due under the terms of the lease in suit. In view of the facts and the law, the judgment of the district court, in the absence of a bill of exceptions, is fully sustained by the pleadings, and is in all things

AFFIRMED.

Note—Mandamus, 36 L. R. A. n. s. 1084; 18 R. C. L. 143; R. C. L. Perm. Supp. 4420; 38 C. J. sec. 26 n. 35.

J. H. HUMPE, APPELLEE, V. E. S. JOSEPHINE TAYLOR, APPELLANT.

FILED OCTOBER 11, 1929. NO. 26785.

1. **Brokers:** DISQUALIFICATION. A broker will not be allowed to recover from a proposed vendor a commission for broker's services where, at the time of the alleged service, he was disqualified to act for the vendor.
2. ———: ———. A broker's commission cannot be recovered from a vendor where the evidence discloses that the only service rendered was for the vendee.

APPEAL from the district court for Lancaster county: JEFFERSON H. BROADY, JUDGE. *Reversed, with directions.*

R. C. Hunter, for appellant.

O. B. Clark, contra.

Heard before GOSS, C. J., DEAN, GOOD, THOMPSON, EBERLY and DAY, JJ., and REDICK, District Judge.

GOOD, J.

In an action to recover a real estate broker's commission, plaintiff had verdict and judgment, and defendant appeals.

The action was founded upon a written contract, the material part of which is as follows:

"Know all Men by These Presents: That J. H. Humpe, agent, of the city of Lincoln, county of Lancaster, and state of Nebraska, for the consideration of the sum of one and no-100 dollars in hand paid, at or before the ensealing and delivery of these presents by E. S. Josephine Taylor, of the city of Lincoln, county of Lancaster, and state of Nebraska, have agreed and do hereby agree to hold until the 30th day of October, A. D. 1927, at 12 o'clock m., time being the essence and important part of this option, subject to the order of the said J. H. Humpe, or assign, the following described property, to wit: The one hundred ten (110) feet by one hundred ten (110) feet located at the Southwest corner of O street and Cotner boulevard.

"It is further agreed that purchaser shall have the privi-

lege of purchasing any amount from 110 feet to 125 feet square, or to transfer the said property at any time within the time above prescribed, to the said J. H. Humpe, or such person or persons as he or they may direct at and for the price of sixty-five hundred ($6,500) dollars good and lawful money of the United States of America, payable on the following terms: The entire amount of the purchase price to be cash, the understanding being that the price is to be $7,000 for 125 feet square or the proportion between $6,500 and $7,000 according to the number of feet required between 110 feet and 125 feet.

"It is also agreed that Mrs. Taylor will pay the regular commission of five per cent. on the first three thousand dollars and two and one-half per cent. on the balance. * * *

"Dated at Lincoln this 30th day of Sept., A. D. 1927.

"(Signed) E. S. Josephine Taylor.

"(Signed) J. H. Humpe."

In effect, the answer admitted the execution of the contract, and denied the other allegations of the petition.

At the close of all the testimony, defendant moved for an instructed verdict, and asserts that there was error in the overruling of the motion. Except the naked promise to pay a commission, nowhere in the contract is there found anything indicating that defendant was listing the property with the plaintiff as a broker; nor is there anything to indicate that the plaintiff undertook or agreed to sell, or attempted to sell, the property, or find a purchaser for the premises. Plaintiff's contention seems to be that, although the contract was in the form of an option, that was only a method by which he could effect a sale to a prospective purchaser. The record discloses, however, that for more than ten years a trust company, of which plaintiff was an employee, had acted as agent for the Standard Oil Company, in procuring sites for its oil stations in the vicinity of Lincoln, Nebraska; that some time prior to September, 1927, the Standard Oil Company had communicated with the trust company, expressing a desire for a location for an oil station at the corner of Cotner Boulevard and O street in

the city of Lincoln. Thereupon, the trust company sent its employee, the plaintiff, to ascertain who were the owners and whether the site at the location indicated could be had for the oil company. Plaintiff then went to the defendant and sought an option on the premises described. She refused to sign an option contract until plaintiff informed her that it was for the Standard Oil Company. Thereupon, the above contract was executed. A few days later plaintiff informed defendant that the oil company would avail itself of the option and take title to the property. The sale was never consummated; whether through the fault of defendant, we think it unnecessary to determine.

From the record it clearly appears that plaintiff was not acting as a broker to procure a purchaser for defendant's property, but, on the contrary, he was acting on behalf of his employer, the trust company, in procuring an option for the benefit of the Standard Oil Company. What he did was for and in the interest of the trust and oil companies. In fact, he was in no position to represent the defendant, because it was his obligation and duty, in representing the Standard Oil Company, to procure the site for it as cheaply as he could. Had he been acting solely for the defendant, it would have been his duty to find a purchaser for her on the best terms obtainable. We think the record clearly discloses that at that time he was not only disqualified to act as broker for defendant, but, in fact, he did not do so.

A broker will not be allowed to recover from a proposed vendor a commission for broker's services where, at the time of the alleged service, he was disqualified to act for the vendor. A broker's commission cannot be recovered from a vendor where the evidence discloses that the only service rendered was for the vendee. It necessarily follows that the judgment for plaintiff cannot be sustained.

Pursuant to the provisions of section 9126, Comp. St. 1922, plaintiff was awarded an attorney's fee. Since he was not entitled to recover on his cause of action, he was not entitled to any allowance for attorney's fees.

The judgment is reversed, with directions to dismiss plaintiff's cause of action.

REVERSED.

Note—Brokers, 45 L. R. A. 37; 4 R. C. L. 329; R. C. L. Perm. Supp. 1119.

J. C. MESSING, APPELLEE, V. DWELLING HOUSE MUTUAL INSURANCE COMPANY, APPELLANT.

FILED OCTOBER 11, 1929. No. 27058.

1. **Insurance:** ATTORNEY'S FEES. Section 7810, Comp. St. 1922, which provides for taxing a reasonable attorney's fee in favor of a successful plaintiff as part of the costs in an action against an insurance company on a real estate fire insurance policy, is based on considerations of public policy.
2. ———: ———. Where plaintiff recovered judgment on a real estate fire insurance policy, and thereafter defendant, in the same case, sought to have such judgment vacated on the grounds of fraud and perjury, and vacation was denied, the court was clearly within its rights under section 7810, Comp. St. 1922, in taxing a reasonable attorney's fee as part of the costs in favor of plaintiff.
3. ———: ———. Further, in such a case, the proceeding to vacate the judgment is but a continuation of defendant's resistance to plaintiff's right of recovery on the policy.
4. **Judgment:** SETTING ASIDE. "It is in the highest degree essential to the welfare of the community, and to the respect which should be given to and the confidence which ought to exist in the judgments of a court, that they should not be set aside unless upon the strongest and most convincing grounds." *Scudder v. Evans*, 105 Neb. 292.
5. **Evidence** examined and found that the trial court was warranted in refusing to vacate the judgment.

APPEAL from the district court for Lancaster county: FREDERICK E. SHEPHERD, JUDGE. *Affirmed.*

G. E. Hager, for appellant.

J. C. McReynolds, contra.

Heard before GOSS, C. J., DEAN, GOOD, THOMPSON, EBERLY and DAY, JJ., and REDICK, District Judge.

THOMPSON, J.

The appellee recovered a judgment in the district court against appellant on a real estate fire insurance policy. Thereafter appellant filed a petition in the same case, under sections 9160 and 9167, Comp. St. 1922, seeking to have such judgment vacated, alleging as a basis therefor fraud and perjury on the part of this appellee (the then plaintiff) in the procurement thereof. Trial was had to the court and judgment rendered denying such vacation, and as a part of the costs there was taxed to appellant in favor of appellee as a reasonable attorney's fee the sum of $150 under section 7810 of the aforesaid statutes. In this section it is provided: "The court, upon rendering judgment against the insurance company upon any such policy of insurance mentioned in the next preceding section, shall allow the plaintiff a reasonable sum as an attorney's fee, to be taxed as part of the costs. If the cause is appealed, the appellate court shall in like manner allow the plaintiff a reasonable sum as an attorney's fee for the appellate proceedings." This section, as well as that "next preceding," is a part of our statutes relating to insurance, and the policy here involved is one designated in such "next preceding" section. The appellant concedes this conclusion; further, that if this were the original action on the policy an attorney's fee on recovery should have been ascertained and taxed in favor of such successful plaintiff. However, it urges that this is not an action on a policy of insurance, but one to set aside a judgment; and it interposes the further challenge that the judgment is against the weight of the evidence and is without support in the record. As to the latter contentions more need not be said than that we have carefully examined the bill of exceptions in connection with the pleadings, and also the authorities cited. The rule as to the evidence required in such a case is: "It is in the highest degree essential to the welfare of the community, and to the respect which should be given to and the confidence which ought to exist in the judgments of a court, that they should not be set aside unless upon the strongest and most convincing grounds."

Scudder v. Evans, 105 Neb. 292. It is our conclusion, as it must have been that of the trial court, that the appellant herein has not brought itself within the above rule. Hence, the prayer of its petition should be denied, and the judgment should include all taxable costs arising out of the controversy.

This leaves for our consideration the question of whether or not error was committed in taxing as a part of the costs an attorney's fee in favor of appellee. We held in *Lancashire Ins. Co. v. Bush,* 60 Neb. 116: "Permitting the taxation as costs of a reasonable attorney's fee upon rendering judgment against an insurance company on a contract insuring real estate is grounded on considerations of public policy and is constitutional." In the course of the opinion in this case, Judge Sullivan went deeply into the reasons prompting such an enactment, as well as the purpose thereof, all of which are as forceful today as they were at the time they were set forth in such opinion, and are applicable to the facts reflected by the record before us.

In our view, the action continues as one on the policy, where the proceeding to vacate the judgment is had in the same case, and the matters presented by the insurance company for the court's consideration would, if found to be true, require the vacation of such judgment and a retrial on the policy. The proceeding to vacate is but a continuation of the appellant's resistance to appellee's right of recovery on the policy. The trial court having found that the appellee had an enforceable judgment as against appellant, and that the latter without a justifiable reason therefor had compelled the additional costs and attorney's fee to be incurred by the appellee, such court was clearly within its rights, under the provisions of section 7810 hereinbefore quoted and the section "next preceding," in awarding a reasonable attorney's fee to appellee.

This conclusion commends itself to our sense of justice and equity, and, as we view these statutory provisions, it is not in conflict with our holding in *Branson v. Branson,* 84 Neb. 288, wherein we stated: "The power to award and

tax costs in legal proceedings being unknown at common law, statutes providing therefor are to be strictly construed."

The judgment of the trial court is affirmed, and an additional attorney's fee of $100 for services in this court is awarded to appellee to be taxed as part of the costs.

AFFIRMED.

STATE, EX REL. O. S. SPILLMAN, ATTORNEY GENERAL, v. FIRST STATE BANK OF PAWNEE CITY, APPELLEE: A. M. HUSTON, TRUSTEE, ET AL., APPELLANTS.

FILED OCTOBER 11, 1929. No. 26919.

1. **Specific Performance.** Where both parties have treated a contract as abandoned and taken steps to restore the *status quo*, and one has altered his position to his detriment, relying upon such apparent abandonment, the latter, in equity, will not ordinarily be required to specifically perform the contract.
2. ———: CONTRACT WITH RECEIVER. A court of equity will not, ordinarily, require the specific performance of a contract entered into with its approval by a receiver, when serious doubt exists as to the power of the court to approve the contract, and the other party may be subjected to litigation and the hazard of being required to pay a sum in excess of the contract price.

APPEAL from the district court for Pawnee county: JOHN B. RAPER, JUDGE. *Reversed, with directions.*

Dort & Witte, for appellants.

C. M. Skiles and *I. D. Beynon, contra.*

Heard before GOSS, C. J., DEAN, GOOD, THOMPSON, EBERLY and DAY, JJ., and REDICK, District Judge.

REDICK, District Judge.

This is an appeal by the appellants from a decree of the district court dismissing their application to be relieved from the performance of a contract whereby they agreed to purchase the remaining assets of the First State Bank of Pawnee City. The facts are not in controversy and are substantially as follows: On May 22, 1928, the bank was in

the hands of a receiver, who entered into a contract with A. M. Huston as trustee for himself, Earl Ryerson, J. F. Halderman, D. W. Osborn, and F. L. Aikins, whereby all the remaining assets of the bank were sold to the trustee for the sum of $47,500 to be paid as specified. The assets consisted of a large number of notes and real estate in Nebraska and Kansas. The beneficiaries of the trust were stockholders in the bank, and it was a part of the agreement that each of them should confess judgment in favor of the bank for the par value of the stock held by him, being the full amount of their stockholders' liability, and that upon rendition of such judgments the receiver would assign them to Huston, trustee. Ida Halderman, at the time of her death, April 19, 1924, was the owner of 78 shares, and it was a part of the agreement that her heirs, to wit, Charles W. Halderman, Frank R. Halderman, Jacob F. Halderman, and William F. Halderman should confess judgments the same as other stockholders, which were to be assigned in like manner.

After the contract had been executed, application was made by the receiver, E. J. Dempster, to the district court for Pawnee county, praying that said contract be approved, and that he be authorized to carry out the same by a transfer of the assets, conveyance of the real estate of the bank to the trustee, and assignment of the judgments to be procured. Notice of the hearing of such application was duly published for two weeks and hearing had by the court on July 14, 1928. After having the matter under advisement for a short time, later in July the court announced his conclusion, approving the contract except in one particular, viz.: The court expressed serious doubt whether the court had jurisdiction to authorize that part of the contract providing for the confession of judgments and the assignment thereof, as it had the appearance of compromising the stockholders' liability, which he considered he had no right to do. Thereupon the court submitted to the parties an order approving the contract of sale with the following conditions or restrictions: "In so far as the power of the court extends at this time to the proposed assignment of the

judgment or judgments against the stockholders which may later be obtained by the receiver"—and authorized the receiver to perform the contract according to the terms thereof, "except it be hereafter held that the court is now without power or authority to authorize the receiver to assign any judgment or judgments he may recover against any or all the stockholders for less than the statutory liability, in which event the proposed assignment or settlement of such judgments shall be left to the further determination of the court to accept or reject."

The above quoted portions of the decree were objected to by the receiver and the trustee, and no further action was taken by either party to procure a satisfactory order, and both parties seem to have come to the conclusion that the contract would have to be abandoned. On August 31, 1928, C. M. Skiles, counsel for the receiver, wrote a letter to Honorable J. B. Raper, district judge, who heard the application, stating that the purchasers were unwilling to complete the deal considering the conditions and reservations suggested in the order of approval above quoted, and expressing the opinion that they would have to call the deal off, and asking what kind of an order would be necessary in order to clear the records so that the receiver could proceed to liquidate the bank and bring suit against the stockholders. No reply was received to this letter, but on September 6 following, without notice to either party or counsel, the district judge entered an order approving the contract in all respects, without the suggested exception and reservation.

September 13, 1928, Mr. Skiles learned of the entry of the order and wrote the trustee informing him of that fact, stating that the guaranty fund commission was now desirous of completing the contract. This the trustee refused to do, and on October 17, 1928, filed application to be relieved from the performance of the contract, setting forth the facts above detailed, upon the ground that the receiver was without authority to enter into that part of the contract providing for the assignment of the judgments, and

that the court was without jurisdiction to approve the same in so far as it affected the liability of the stockholders of said bank.

As a further ground for release from said contract, the trustee called attention to the fact that three of the Halderman heirs were not parties to it and had refused to confess judgment as required thereby. Numerous conversations were had with officers and representatives of the guaranty fund commission by the trustee and one of the beneficiaries, upon the assumption that the contract would not receive the court's approval for the reason that it amounted to a compromise of the stockholders' double liability, which, it was believed, would be contrary to the statute, and steps were taken to restore to the trustee the $5,000 paid upon the contract. And as a further ground, it was alleged that, by reason of the delay in procuring the order, the trustee was compelled to cancel certain contracts for the sale of some of the lands to be conveyed, whereby he had been subjected to loss and expense, and that because of the change in the situation it would be inequitable to now require performance of the contract.

An answer to said application was filed by the receiver, and reply to said answer by the trustee, the contents of which we do not deem it necessary to set out in detail. Evidence was taken and hearing had upon the application and other pleadings, and, as before stated, the application was dismissed.

As to the claim of the trustee that the court was without authority to approve the contract because it amounted to a compromise of the stockholders' liability, we think this question is not presented by the record before us. It does not appear what portion of the consideration to be paid by the trustee was represented by the judgments to be procured and assigned, and what portion by the assets of the bank. The total stockholders' liability of the trustee and his beneficiaries was the sum of $17,500. It is quite possible that the consideration to be paid represented the full amount of this liability, plus the remainder of the purchase

price, $30,000, for the other assets. We will, therefore, not discuss nor determine the question of the power of the court to authorize, under any circumstances, a compromise of the stock liability of stockholders in banks.

As to the objection that three of the heirs are not parties to the contract and cannot be compelled to confess judgment for the amount of their stockholders' liability, if any, we are unable to perceive how the trustee can make the point, because those provisions of the contract were for the benefit of the trustee and the parties he represented, and the acts to be performed were wholly within their control. If they wished to obtain the benefit of the contract, they could at any time confess judgment and demand an assignment.

The most serious question is whether or not, under the circumstances disclosed by the record, in equity and good conscience the contract should be specifically enforced over the objection of the trustee. It appears beyond question that upon the announced refusal of the court to approve the contract for want of jurisdiction, upon the theory that it amounted to a compromise of the stockholders' liability, both parties considered the contract at an end and so treated it. They discussed the matter and took steps to restore the part payment which had been made upon the contract, and to procure the proper order to clear the records so that the receiver might proceed with the closing of the bank as though no contract had been made. The trustee took no further steps toward the execution of the contract and canceled two contracts which he had made for the sale of part of the lands to be conveyed, upon the assumption that the contract would not be approved. In short, the parties treated the contract as abandoned. No further application was made to the court beyond the letter of Mr. Skiles asking the judge what kind of an order would be necessary to clear the records. The court then, upon its own motion and without notice to either party, entered the order of approval. We do not think, under these circumstances, that the trustee should be required to perform the contract. True, it does not appear from the record that

the trustee has suffered any definite loss by reason of the cancelation of the contracts referred to, nor that there has been any change in the value of the bank assets to be transferred, but we think the trustee was justified in considering the contract ended and taking no further steps toward its execution upon learning of the position of the court as to its authority to approve the contract. The change of opinion by the court upon this question did not resolve the serious doubt as to the validity of the contract. The trustee is in a position analogous to that of a purchaser at judicial sale and should not be compelled in equity to accept a doubtful title which may expose him to the hazard of further litigation with parties not before the court. Notwithstanding the holding of the district court and an affirmance by this court, upon a record which does not disclose that any compromise of stockholders' liability was attempted, that question would still be open and the trustee might be subjected to litigation and the hazard of being required to meet the stockholders' liability which it was the intention of the contract to extinguish, in addition to the cash required to be paid by the contract. Equity requires that, in doing justice to one party, injustice be not done to the other. *Cook v. Stafford*, 86 Mich. 163.

We conclude that in view of the conduct of the parties upon the assumption that the contract would not receive the approval of the court, and the serious question of the authority of the court to approve the contract as made, it would be inequitable and unjust to require specific performance. It follows that the order of the district court dismissing appellants' application to be relieved from the contract is erroneous and must be reversed, with instructions to the district court to enter an order sustaining such application, canceling the contract, and relieving the parties from all obligations thereon.

REVERSED.

FLORENCE STONE, APPELLEE, V. LLOYD STONE, APPELLANT.

FILED OCTOBER 11, 1929. No. 26702.

1. **Adoption: DECREE: COLLATERAL ATTACK.** Where the county court has jurisdiction of the subject-matter and of the parties to an adoption proceeding, the decree of adoption is not subject to collateral attack.
2. **———: ESTOPPEL.** A parent who appears in open court, participates in, and consents to an adoption proceeding, and afterwards treats such proceeding as valid, is thereafter estopped to deny the validity of such adoption proceeding.

APPEAL from the district court for Dawson county: J. LEONARD TEWELL, JUDGE. *Reversed and dismissed.*

Frampton & Polk, for appellant.

Cook & Cook, contra.

Heard before GOSS, C. J., ROSE, GOOD, EBERLY and DAY, JJ., and REDICK and RYAN, District Judges.

RYAN, District Judge.

This is an appeal from a judgment of the district court for Dawson county, ordering the defendant to pay the sum of $20 a month for the support and maintenance of his minor son, William Bernard Stone, until further order of court, and $100 attorney's fee and costs of suit.

The plaintiff and the defendant were married on January 2, 1913. On April 13, 1921, the plaintiff commenced action for divorce in the district court for Dawson county. The minor child, William Bernard Stone, was at that time but eight months old. On the 11th day of June, 1921, the plaintiff and the defendant entered into a stipulation which provided in brief that no testimony should be taken as to the alimony and support of the child at this time, and, further, that in case the child should be adopted on or before the next term of court the defendant agreed that in that event, provided he was relieved from further responsibility for the care and maintenance of the child, he would pay the plaintiff the sum of $1,000 and an additional sum of $500 a year, to be paid on the first day of January each year for three

years; that this sum of $2,500 should be in full for alimony and for the support, maintenance and care of the child.

The parties further agreed in this stipulation that, in the event the child should not be adopted before the first day of the next term of court, then the court should take testimony and make such allowance as in his judgment would be just and equitable for the support and maintenance of the child and for such alimony as in the discretion of the court would be just and equitable.

In accordance with this stipulation the court on the same day entered a decree of divorce in favor of the plaintiff, which decree made no provision for the custody, support or maintenance of the child or alimony.

It further appears from the record that on the 27th day of June, 1921, the parents of the plaintiff, Andrew J. Hurd and Hettie Hurd, petitioned the county court of Gosper county, Nebraska, to adopt the said minor child, William Bernard Stone; that said petition asked for an unconditional adoption, and that the name of said child be changed to William Bernard Hurd; that on the same date the plaintiff and the defendant appeared in person in the county court of Gosper county and filed their written relinquishment and consent to the unconditional adoption of said child, and that on the same date the county court of Gosper county, Nebraska, entered an unconditional decree of adoption.

The record also shows that on the same date, to wit, June 27, 1921, exactly 30 minutes after the decree of adoption had been entered and filed by the court, the plaintiff in this action, Florence Stone, petitioned the county court of Gosper county to adopt William Bernard Hurd, and that his name be changed to William Bernard Stone, and that the adopting parents, Andrew J. Hurd and Hettie Hurd, filed their relinquishment, and the court entered an unconditional decree of adoption, decreeing that William Bernard Hurd be adopted by Florence Stone unconditionally, and that his name be changed to William Bernard Stone.

Thereafter, on the 11th day of July, 1921, the district

court entered a supplemental decree, in accordance with the stipulation of June 11, 1921, which was filed in the court under date of June 25, 1921, as follows:

"Now on this 11th day of July, 1921, this cause came on for hearing upon the stipulation on file under date of June 25, 1921.

"Court finds, that the child having been adopted by the father and mother of the plaintiff as per stipulation on file under date of June 11, 1921, and filed on June 25, 1921; that the defendant pay to the plaintiff as alimony the sum of $1,500, payable as follows, to wit: $500 on January 1, 1922, $500 on January 1, 1923, and $500 on January 1, 1924, with interest at 6 per cent. from date. The court further finds that the defendant has paid to the plaintiff the sum of $1,000 on the stipulation now on file, leaving the above sum of $1,500 yet unpaid.

"It is therefore ordered, adjudged and decreed that the plaintiff recover of and from the defendant the sum of $1,500 with interest at 6 per cent. from date payable, as follows: $500 on January 1, 1922, $500 on January 1, 1923, and $500 on January 1, 1924. It is further ordered, adjudged and decreed that the defendant pay the costs of this action."

It appears from the record that the $2,500 was duly paid according to the stipulation, and on February 1, 1928, the plaintiff filed a petition in the district court for Dawson county which relates the facts of the case practically as they have been detailed here. This petition further alleged that the adoption proceedings had in Gosper county on the 27th day of June, 1921, in which Andrew J. Hurd and Hettie Hurd purported to adopt said minor child were void for the reason that the same were not entered into in good faith by the parties or by the defendant, and that it was never the purpose or the intention of the said Hurds to take said child as their own and to care for said child, and that said proceedings were simply a pretense and a subterfuge whereby the defendant was attempting to escape liability for the support of his child; and that said proceedings were void

for the further reason that no notice of said proceedings was given as provided by statute, requiring 14 days to elapse between the filing of the petition and the hearing. Plaintiff further alleged that she had no property and no income or means of support other than such as she was able to earn by her own labor, and that her earnings were insufficient to properly maintain, support and educate said child; that the defendant is a strong, able-bodied man and the owner of considerable property and able to contribute to the support, maintenance and education of said child; and prayed that the decree of divorce entered on the 11th day of June, 1921, be modified, and that the defendant be ordered and adjudged to pay into court each month, until further order of court, such sum as shall to the court seem reasonable for the support and maintenance of said child.

The answer admits the marriage, but denies that the defendant is the father of said minor child, denies that there was any fraud in the adoption proceedings held in Gosper county, and alleges that the adoption proceedings were had in good faith, and that all parties were present in court, and further alleges that said adoption proceedings are not subject to collateral attack, and that the plaintiff is estopped from denying the validity of the same, and that under such adoption proceedings and the statutes relative thereto the defendant has been relieved from all liability for the support of said child, and prays that the petition may be dismissed.

Upon the trial of the case the court entered a supplemental decree, which, without making any mention of the adoption proceedings, found generally for the plaintiff and against the defendant, found that the child, William Bernard Stone, was born as the issue of the marriage of the plaintiff and defendant, and committed said child to the care and custody of the plaintiff, and decreed that the defendant should pay into court for the support and maintenance of the child the sum of $20 a month, commencing June 1, 1928, and continuing on the first of each and every month thereafter until said child arrived at the age of 18 years, and also

the further sum of $100 as attorney's fees, from which decree the defendant appeals to this court.

The counsel for the appellee seek to support this decree by the authority of *Connett v. Connett*, 81 Neb. 777, and *Chambers v. Chambers*, 75 Neb. 850, and this appears to have been the theory upon which the district court entered the decree complained of. In the case of *Connett v. Connett, supra*, this court laid down the rule: "Where, in a decree of divorce, the court includes an order concerning the custody or maintenance of minor children, those infants in a sense become wards of that court, and it has authority at any subsequent period of their minority, upon application of either parent and sufficient notice to the other, to revise and alter the decree so far as it relates to the care, custody or maintenance of the children." And further: "The parents cannot by contract between themselves, nor can the court by any order it may make in the divorce suit, irrevocably determine the amount of money the father shall contribute for the support and education of his children, so as to deprive that court of power, upon a proper showing and notice, to alter said decree in the interest of justice and for the benefit of said children." The rule announced in the *Chambers* case, *supra*, is substantially the same.

This court would have no difficulty in following these cases and affirming the decree of the trial court, were it not for the adoption proceedings had prior to the entry of the decree fixing the alimony payable to the plaintiff. The trial court made no finding whatever with reference to the decree of adoption. The stipulation of the parties, which was entered into prior to the hearing of the divorce case on July 11, 1921, it seems to us, was a perfectly fair one, and it contemplated the subsequent adoption proceedings. It further provided that, in case the child should not be adopted, then the amount of alimony and allowance for the support and maintenance of said child should be left to the judgment and discretion of the court. When the supplemental decree was entered on July 11, 1921, the adoption proceedings had been had, and the court found in that case

that said child had been adopted by the father and mother of the plaintiff in accordance with the stipulation on file under date of June 11, 1921, and entered a decree providing for the payments of alimony in accordance with that stipulation, and because of the adoption proceedings made no provision for the support of the minor child.

In view of the record, we do not see how the allegation of the plaintiff's petition that the adoption proceedings were not entered into in good faith can be sustained. If there was any lack of faith, it appears conclusively to this court that it was upon the part of the plaintiff in instituting the second adoption proceedings and in not informing the defendant and the court, at the time of the modification of the decree, of such second adoption proceedings.

In the case of *Milligan v. McLaughlin*, 94 Neb. 171, the adoption proceedings were very similar to those in this case, except that the husband of the adopting party did not sign the adoption petition. It also appears that the proceedings were not had in the county of which the adopting parents were resident. The court in that case, speaking through Letton, J., held that the collateral heirs of the adopting parent were estopped to deny the validity of the adoption proceedings.

In the case of *Ferguson v. Herr*, 64 Neb. 659, this court held that, in rendering the decree provided for in the adoption statutes of Nebraska, the county court acts judicially, and such decree has all the force and effect of a judgment, and is subject to collateral attack only for want of jurisdiction.

In the adoption proceedings had in Gosper county the jurisdiction of the county court cannot be questioned. The decree of adoption rendered by that court was not appealed from and is not subject to collateral attack in this proceeding. Moreover, plaintiff in this action has treated such adoption proceedings as valid. She appeared in the district court for Dawson county and represented to the court that the minor child had been adopted by her parents, and, on the strength of that representation and such adoption

proceedings, was granted an alimony judgment in the sum of $2,500 and she is now estopped to deny the validity of such proceedings.

We conclude, therefore, that the defendant by the adoption proceedings was relieved of all family duties toward and all responsibilities for said minor child and is not now liable for its maintenance and support.

The decree of the district court is reversed and the action dismissed.

REVERSED AND DISMISSED.

CHARLES KAMRATH v. F. T. GILBERT ET AL.: HATTIE KLUG RAKOWSKY ET AL., APPELLANTS: STATE BANK OF MADISON, APPELLEE.

FILED OCTOBER 25, 1929. No. 26672.

1. **Estoppel:** LOAN TO AGENT HOLDING TITLE TO LAND OF PRINCIPAL. R. furnished money to an agent to purchase an undivided eight-ninths interest in real estate, in which his wife owned an undivided one-ninth interest. He permitted the agent to take title in his name, and in furtherance of the deal caused his wife to also deed her interest to the agent. The bank loaned money to the agent in good faith upon the strength of his title. *Held*, that, having placed his agent in a position enabling him to perpetrate the fraud, R. is estopped from setting up his ownership to the real estate against the claim of the bank.
2. **Banks and Banking:** FRAUD OF AGENT. In such a case, the bank upon discovery of the fraud, must apply any deposit the agent may have in the bank on its account for the protection of the one injured by the fraud.

APPEAL from the district court for Madison county: DE WITT C. CHASE, JUDGE. *Affirmed as modified.*

R. J. Shurtleff and *O. S. Spillman*, for appellants.

Dowling, Thielen & Dougherty, for appellee.

M. B. Foster, for plaintiff, Kamrath.

Heard before GOSS, C. J., DEAN, GOOD, THOMPSON, EBERLY, and DAY, JJ., and REDICK, District Judge.

PER CURIAM.

In the beginning this action was brought to foreclose a real estate mortgage relative to which there is now no controversy. The issue in this appeal is between the appellants, Gustave Rakowsky and Hattie Klug Rakowsky, and the appellee, State Bank of Madison. The trial court found that the real estate which stood in the name of one Gilbert was in fact the property of Gustave Rakowsky and Hattie Klug Rakowsky, but that the bank was entitled to a lien upon it to the extent that it had loaned money to Gilbert upon his representation of ownership, supported by the land records of Madison county. In this respect the court found that the appellants were estopped to assert or claim any interest in the real estate involved against the interest of the Madison bank.

Since this is a suit in equity and triable *de novo* in this court, it is well to set out a statement of facts as found from the record. This case was previously argued before the commission and an opinion filed herein. In the original briefs and the brief for rehearing, the appellants complain of the application of the law to the facts in the case. They seem not to realize that the trial court and the commission found against their contention upon the question of fact.

The facts in the case are not so complicated as they are awkward of statement. Mrs. Rakowsky was the devisee under the will of her father of an undivided one-ninth interest in certain real estate. It was the desire of her husband to purchase the other eight-ninths interest in the property. To attain this end, he employed one Gilbert, and gave him a power of attorney, because he apprehended some difficulty in negotiating this deal with the relatives of his wife. On the day that the contract and power of attorney were made and signed, Rakowsky gave to Gilbert the sum of $5,200 and later, about the 14th day of January, 1927, gave to Gilbert the sum of $3,750. Rakowsky desired some evidence of the payments, and Gilbert gave him his note for those amounts. Gilbert purchased the interest of each of the seven adult

heirs, and obtained deeds from them, the deeds running to Gilbert. About February, 1927, Gilbert told Rakowsky that he had made such arrangements that he would be able to purchase the minor's share in the estate, being one-ninth, and that it would be necessary for Rakowsky and wife to convey to him the interest that Mrs. Rakowsky had in the estate, which was done; Gilbert giving his note for the same, $950. All of the property stood in the name of Gilbert except the one-ninth interest of the minor. Gilbert leased the farm for one year to a brother-in-law of Rakowsky, and moved into the house in Madison. Everything was done to indicate to the public generally, and the relatives in particular, that Gilbert, and not Rakowsky, was the purchaser of this property. Rakowsky and his wife gave Gilbert a deed to their own interest in the property in order that he might show it to the mother of the minor as an inducement to her to consent to the sale of the minor's interest. We think it can fairly be deduced from the evidence that this was the real reason for the secrecy and the concealment involved in the transaction.

Finally, Rakowsky became apprehensive of Gilbert, and impatient to have this purchase completed and the land deeded to him. Gilbert was somewhat elusive, but on August 12, 1927, they entered into an escrow agreement, whereby Gilbert and his wife executed a warranty deed to Rakowsky and his wife, placed in the Nebraska State Bank at Norfolk, Nebraska, to be delivered to Rakowsky when the minor heir's interest was secured, and upon the payment by Rakowsky to Gilbert of the remainder due him on completion of title and return of Gilbert's promissory notes heretofore mentioned.

In the meantime, Gilbert being in possession of this real estate, with the title in him of an undivided eight-ninths interest, borrowed money from the appellee bank upon a series of notes. Gilbert represented to them that he was the owner of an undivided eight-ninths interest, and an inspection of the records by the bank in the office of the register of deeds for Madison county supported his representation.

Rakowsky contends that sometime after August 12, 1927, he notified the bank of his interest in this real estate. At that time all the loans had been made except the last one, which was made by the bank to supply money to purchase the one-ninth interest of the minor heir, and the bank held $946 of the $1,575 loan to pay for this minor's interest. This question as to whether Rakowsky gave the bank notice at this time that Gilbert was simply his trustee, and had no interest in the property except as said trustee, was resolved as a question of fact against the appellants. We make the same finding in this particular. It is apparent that Rakowsky was not at the bank to give information, but to acquire information. As a part of his distrust of Gilbert, he wanted to ascertain if he had mortgaged the land. The purpose of this trust had not yet been accomplished, that is, acquisition of the minor heir's interest. He was beset by two fears; on the one hand, that Gilbert might not handle the transaction well, and, on the other hand, that he might not make an advantageous purchase, as schemed, of the minor's one-ninth interest. He thought he had safe-guarded his rights by the escrow deed. It was not until October 13, 1927, that he proclaimed to the world the truth about the transaction by filing an affidavit with the register of deeds. The cashier of the bank denies that Rakowsky told him of the situation. We conclude that he did not give such notice that would put the bank upon inquiry. We find from a careful examination and consideration of the record that the bank did have notice on October 8, 1927, when, in a conference between Gilbert and the cashier of the bank and the attorney for the bank, the attorney, in the words of the cashier, "didn't mince words; he told Mr. Gilbert what he thought of him." That same date Gilbert confessed judgment in favor of the bank, and subsequently Rakowsky gave the notice by affidavit. At this time Gilbert had on deposit in said bank the sum of $436.52.

Certain propositions have been cited by counsel which are fundamental in their nature and need no discussion in this opinion. However, in the case of *Roy v. McPherson*, 11

Neb. 197, which is not only an early case but has been a ruling case in this state upon this character of trusts, it is held, in substance, that, where the title to real estate is placed in another who obtains credit on said apparent title, the real owner will be estopped from setting up his claim against one who has advanced money, in good faith, upon the strength of the apparent title. This is supported in the cases of *Early v. Wilson*, 31 Neb. 458, *Hoagland Bros. v. Wilson*, 15 Neb. 320, and *Laing v. Evans*, 64 Neb. 454.

The rule is well settled, in this and practically all other jurisdictions, to the effect that—"Where one of two innocent persons must suffer through the misfeasance of the agent of one, that one must suffer who has placed the agent in a position to perpetrate the fraud complained of." *Rehmeyer v. Lysinger*, 109 Neb. 805; *Bull v. Mitchell*, 47 Neb. 647. The *Rehmeyer* case was cited with approval in the case of *Taylor v. Flodman*, 109 Neb. 812. See, also, *Deleski v. Peters Trust Co.*, 115 Neb. 547, wherein it is stated: "Where one of two innocent parties must suffer a loss, he whose negligence caused the injury should bear the loss." This is well established and a universal rule.

The determination, then, must be upon the evidence. If the credit was given to Gilbert, who represented to the bank that he was the owner of these premises and other property, and the bank investigated and found his representations to be true, as shown by the record, and that Rakowsky knew at the time that Gilbert did have the record title to the premises, but no notice of Rakowsky's interest therein came to the knowledge of the bank until the loans had all been made, then the judgment against Gilbert would become a lien upon the premises.

On the other hand, the bank would not be entitled to a lien on the premises for any money loaned after the information had been received. If the testimony of Rakowsky be true, then there was enough in his notice to Taylor to put the bank upon inquiry, which, if pursued, would show who was the real owner of the premises. On the other hand, if the testimony of the cashier was true, Rakowsky

had no remedy and his interest in the premises would be subject to the lien of the bank.

The principles involved herein were thoroughly discussed in the opinion of *Hansen v. Berthelsen*, 19 Neb. 433, at page 438 of the opinion, and the court, in part, said: "As between Love and the plaintiff the latter was most to blame, as he had placed in the hands of another the means for perpetrating a fraud and permitted such means to remain in her hands after he knew, or had reason to know, that the power was liable to be abused, hence the equity of Love, for the money paid by him, is superior to that of the plaintiff." Several cases are cited in support of that proposition. Among others is the case of *Resor v. Ohio & M. R. Co.*, 17 Ohio St. 139. In the case last cited the vendor put the vendee in possession and placed in his hands a deed of the land sold, with an agreement that it should not be considered delivered or become effectual until the purchase money was paid. The vendee subsequently put the deed on record without paying the purchase price, and mortgaged the lands to *bona fide* mortgagees for value and without notice. The court held that as against the mortgagees the vendor could not assert a claim to the land.

In the instant case Rakowsky knew when his wife gave the deed in February, 1927, that Gilbert was taking title to the premises in his own name. He remains silent as to this until he gave what he claims was a notice to the bank in August, the exact date of which he is not certain. His testimony as to that transaction is vague, uncertain and indefinite. He went to the bank for the purpose of seeing about a lease of the premises. The evidence discloses that until that time Radowsky had made no effort to assert his title to the premises. He had allowed Gilbert to place the deed from the heirs upon record, in which Gilbert was grantee. He had been permitted by Rakowsky to lease the farm and to move with his family into the town home. It was not shown that the bank had any notice of any kind, actual or constructive, of the interest of Rakowsky, unless it was in August, 1927. The bank had taken all the necessary pre-

cautions possible in order to ascertain whether the title stood in Gilbert. It has been stated the bank should have taken a mortgage on this property to secure its claim. We are not concerned with that phase of the question. The bank did not take a mortgage and, under the law governing this class of cases, was not required to do so in order to acquire a priority over Rakowsky to the extent of the money which it innocently and in good faith loaned to Gilbert.

The trial court found by his findings and decree that the testimony of the cashier, Mr. Taylor, was true, and that there was no notice given, as related by Rakowsky, and contradicted by the cashier. And we believe the circumstances would bear out that conclusion, as the bank afterward loaned a large sum in addition to the indebtedness Gilbert had already incurred. While the conclusions of the trial court are not binding on this court and the cause should be tried *de novo* here, nevertheless, we are entitled to give some consideration to the court's findings of fact, as he was in a better position to determine the facts than are we. In the case of *Brown v. Stroud & Co.*, 112 Neb. 210, the court in the opinion, at page 216, say: "The findings of a trial judge, who made a thorough and painstaking original investigation, although no longer conclusive, are entitled to respectful consideration, if not to considerable evidential weight, in this court"—citing *Corn Exchange Nat. Bank v. Jansen*, 70 Neb. 579.

Counsel for appellants has cited the case of *Rihner v. Jacobs*, 79 Neb. 742, to support the contention that, where the acts were induced by fraud, no estoppel can arise. A careful reading of the cited case will disclose that the same condition did not exist in that case as in the instant case. In the *Rihner* case the deed was obtained by fraud; in the instant case Gilbert, while the power of attorney and contract did not authorize him to do so, took the title to the premises in his own name, but that proceeding was ratified by Rakowsky and this ratification and his remaining silent for several months thereafter was the potential cause of this litigation. Gilbert's fraud was not directed to Rakowsky but to

the bank; he committed no fraud by misrepresentation as against appellants in the purchase of the lands; he fulfilled his contract with his principal, except as modified by acquiesence of Rakowsky. The cases of *Mulligan v. Snavely*, 117 Neb. 763, and *Deleski v. Peters Trust Co., supra*, are contrary to counsel's reasoning.

When the appellee bank learned of the fraud of appellants' agent, it should not have allowed the agent to draw upon it further, but should have applied his remaining deposit to its judgment against him. A bank has authority to apply its debtor's deposit to the debt. *State v. Farmers & Merchants Bank*, 114 Neb. 378. And it is generally required to do so when it knows that such action is necessary for the protection of a third person. 3 R. C. L. 596; 7 C. J. 657. The appellee had the means of protecting itself to the extent of the wrongdoer's remaining deposit; it cannot claim to have incurred that part of the loss on account of reliance upon the agent's ownership of appellants' land. The deposit so available to the bank was $436.52. This amount should be deducted from the account as of October 8, 1927, with proper allowances for interest.

Coming to the conclusions that we do, the judgment of the trial court is affirmed as modified by the deduction of $436.52 from the account as of October 8, 1927.

AFFIRMED AS MODIFIED.

Note—Estoppel, 22 L. R. A. 257; 30 L. R. A n. s. 1; 46 L. R. A. n. s. 1097; 10 R. C. L. 788; R. C. L. Perm. Supp. 2754.

WYLIE C. SPEAS, APPELLEE, V. BOONE COUNTY, APPELLANT.

FILED OCTOBER 25, 1929. No. 26928.

1. **Master and Servant:** INJURY TO SERVANT. Generally it may be said that an injury "arises out of" an employment when there is a reasonable causal connection between the conditions under which the work is, in all the circumstances, required to be performed and the injury received while the employee is thus engaged; and the injury is received "in the course of" the employment when, the time the injury is received, the work-

man is engaged at the work he is employed to perform or in some duty incidental to that work. If incidental, it must be incidental to the main character of the business on which the employee was engaged for the employer. It cannot occur independent of the relation of master and servant.

2. ———: ———. Where a servant, employed with his team for a definite sum per day in dragging roads for the county, engaged in dragging a road in front of his own farm, suspends his work of dragging when he reaches his home at the noon hour for the purpose of feeding his team and eating his dinner, and, after unhitching his horses, is kicked and injured by one of them, hitherto gentle, as he is putting them in their stalls to feed them, the accident arose out of and in the course of his employment, within the meaning of section 3024, Comp. St. 1922.

3. ———. ———: LIMITATIONS. The plea of the statute of limitations is not available under section 3061, Comp. St. 1922, to an employer who has agreed within the year after an accident to an employee, arising out of and in the course of his employment, to compensate the employee, and the employee, in reliance upon the agreement, waited more than a year, but a reasonable time in the circumstances, to file his petition for compensation after the employer had failed to pay.

4. ———: WORKMEN'S COMPENSATION ACT: CONSTRUCTION. "The workmen's compensation act 'is one of general interest, not only to the workman and his employer, but as well to the state, and it should be so construed that technical refinements of interpretation will not be permitted to defeat it.'" *Baade v. Omaha Flour Mills Co.*, 118 Neb. 445.

APPEAL from the district court for Boone county: FREDERICK L. SPEAR and LOUIS LIGHTNER, JUDGES. *Affirmed.*

Holmes, Chambers & Holland, for appellant.

Vail & Flory, contra.

Hall, Cline & Williams, amici curiæ.

Heard before GOSS, C. J., ROSE, DEAN, GOOD, THOMPSON, EBERLY and DAY, JJ., and REDICK, District Judge.

GOSS, C. J.

This is an appeal by the county from a judgment in favor of Wylie C. Speas under the workmen's compensation act.

This is the second time this case has been argued before

us; an opinion affirming the judgment was filed June 4, 1929, but was not published; on June 29, 1929, a motion for rehearing was sustained and the judgment of affirmance was set aside; on October 5, 1929, upon suggestion of the death of Wylie C. Speas, the cause was revived in the name of John S. Speas, administrator; and on October 9, 1929, the case was reargued and was reassigned to the same member of the court for an opinion on the merits.

It was stipulated on the trial that the plaintiff was injured on the 4th of October, 1926, and by reason of the injury was unable to return to work until March 1, 1927; that the medical expenses were $139 for one doctor, $39.50 for another, and the hospital bill was $38.

The district court found that the injury arose out of and in the course of employment; that the employee was receiving wages of $3.50 a day or $21 a week and was entitled to compensation at the rate of $14 a week, or a total of $295 for himself, $178.50 for doctors, $38 for hospital, and $50 for attorney's fee.

The county claims (1) that the injury did not arise out of and in the course of the employment, and (2) that no petition was filed within a year after the accident occurred, by reason of which the statute of limitations had run.

The evidence shows that Speas had been employed on road work for the county for a considerable time. For straightaway dragging he received a definite sum per mile; for special work, such as dragging down and leveling newly prepared stretches of road, the pay was $3.50 a day for a man and $7.50 a day for a man and a team of four horses. The reason for the two classes of wage scales was that the straightaway mileage could readily be checked by well-known sectional subdivisions, while the dragging could not be definitely and easily measured; so the latter was paid for by the day. On the 4th of October, 1926, Speas was using a four-horse team furnished by him, dragging for the county on the road passing his farm. At about 11:30 he ceased dragging for the forenoon because he was then in front of his home. He drove the rig into the yard and unhitched

with the aid of his son who came from the house to help him. The horses went to the tank to drink and thence to the barn. Speas entered to tie them and, as he went past them for this purpose, one of them, theretofore gentle, kicked him, causing the injury complained of. Almost immediately the injury was reported to the county foreman under whom Speas worked. The county commissioners afterwards learned of the injury and expected to pay compensation to the injured employee. It was his duty to furnish feed and to care for the team. It was intended by both parties that Speas and the team should continue the road dragging that afternoon.

The county now claims that, the injury being caused by the kick of a horse furnished by the employee, happening at the noon hour and not while the employee was actually engaged in dragging the road, therefore the employer is not liable.

It is difficult to formulate a definition of the words "arising out of and in the course of his employment," as phrased by the statute (Comp. St. 1922, sec. 3024), so as to cover all cases of compensable injury to an employed workman or so as to exclude those that are not compensable. Generally it may be said that an injury "arises out of" an employment when there is a reasonable causal connection between the conditions under which the work is, in all the circumstances, required to be performed and the injury received while the employee is thus engaged; and that the injury is received "in the course of" the employment when, at the time the injury is received, the workman is engaged at the work he is employed to perform or in some duty incidental to that work. If incidental, it must be incidental to the main character of the business on which the employee was engaged for the employer. It cannot occur independent of the relation of master and servant. Even with such general principles in mind, it is sometimes a close question to discover whether an accident arises out of an employment and whether it occurred in the course of the employment. It may therefore be said of this element or phase of work-

men's compensation cases that, in a greater degree perhaps than in other cases, each individual case stands or falls on its own facts.

In his argument for affirmance, appellee cites *Tragas v. Cudahy Packing Co.*, 110 Neb. 329, as controlling in principle. In that case this court affirmed a judgment allowing compensation to Tragas, who, at the time of his injury, was engaged in sharpening a chisel for the purpose of cleaning some pans. It happened during the noon hour, and was done on claimant's own time, for which he was not paid. It was held that the work on which Tragas was engaged was incidental to his employment. When the injury occurred, the employee was grinding the chisel on one of the employer's grindstones, which was not equipped with a safety guard as provided by law. While the opinion does not so state, yet it may be inferred that the employee was using the employer's grindstone on the employer's premises. We do not discover that this case has been subsequently cited on the phase involved in the present case.

Appellee also cites *Punches v. American Box Board Co.*, 216 Mich. 342. In that case an employee, who was expected to care for and feed a team of horses he was hired to drive, was in the habit, with his foreman's knowledge, of driving them home at night for convenience and of keeping them in his own barn. In driving them to his employer's place of business to begin the day's work, he was injured. It was held that he was acting in the scope of his employment and was entitled to compensation.

Another case cited by appellee is *Brown v. Bristol Last Block Co.*, 94 Vt. 123, where a man employed with his team was killed by it about the noon hour, after he had eaten his dinner, while attempting to stop the team when it was running away. He was run over and killed. It was held that the accident arose out of and in the course of his employment. In the opinion it was said: "The horses were hired by the employer, and, for the time in which the accident happened, their services belonged to it, and the employer was materially interested in that service." The opinion

cites *Ingram's Admr'x v. Rutland R. Co.*, 89 Vt. 278, wherein allowance of compensation was upheld for the death of a fireman killed by a switch engine in the yards after he had left his locomotive to get a glass of milk at a milk station across the tracks. Many cases are cited in the *Ingram* opinion showing what are permissible digressions and interruptions without so disturbing the relation of master and servant as to do away with the liability to pay compensation.

The only other case cited by appellee in his argument for affirmance is *Derleth v. Roach & Seeber Co.*, 227 Mich. 258. The employee was killed by monoxide gas in his own garage while caring for his own automobile. He had gone home near the close of the day to prepare the car for a trip to be taken as a traveling salesman. The trip was usually taken by train, but whenever he used his car the employer made an allowance of 10 cents a mile for its use. The death occurred at 5:15 p. m., which was within the employee's usual hours of service. The injury was held compensable as "arising out of and in the course of his employment." The opinion cites *Punches v. American Box Board Co., supra;* quotes *Clifton v. Kroger Grocery & Baking Co.*, 217 Mich. 462, where the employee was injured while, as directed by his employer, taking home for safe-keeping a considerable amount of money collected at the employer's store; and cites *Matter of Kingsley v. Donovan*, 155 N. Y. Supp. 801, where the employee owned a motorcycle used in going to and from his work and between jobs, but received no pay for its use. While cleaning it after he had arrived for work he was injured. In each of the three cases last cited the injury was held to be compensable.

In its argument for reversal, appellant relies on a Vermont case, *Kneeland v. Parker*, 100 Vt. 92: "Where teamster, owning pair of horses, who had been engaged to draw logs of employer from wood lot for distance of four miles to employer's mill at specified rate per thousand feet, without agreement to haul any specific quantity or to work for any definite time, stopped at hotel midway between wood

lot and mill for his own convenience, and there received injuries, resulting in his death, while cleaning off one of the horses known by him to be vicious, preparatory to commencing his day's work, by being trampled upon by such animal, held that accident did not arise out of nor in course of his employment." The opinion distinguishes the case from *Brown v. Bristol Last Block Co.*, 94 Vt. 123, by quoting from the last-named case: "The horses were hired by the employer, and, for the time in which the accident happened, their services belonged to it, and the employer was materially interested in that service; while Kneeland was not hired by the day, but by the quantity hauled, could quit the job at any time, and the accident happened in the morning before he had even started upon the work of a day for the defendants."

Another case cited by appellant on this point is *Morey v. City of Battle Creek*, 229 Mich. 650. Keagle was a driver employed by one Avery, who contracted with the city to furnish it teams and drivers as needed at 85 cents an hour. Keagle was paid by Avery one-half of the amount Avery received. At 4:45 in the afternoon the officer in charge of city work told Keagle there was not sufficient time to get another load of dirt and he could go home. He at once left, and when about three-quarters of a mile from the work one of his horses was bitten by a dog, the team ran away, and Keagle was killed. His widow, Mrs. Morey (who had again married), was denied compensation in accordance with the general rule in Michigan construing the compensation law as not applying to accidents which befall employees in going to and leaving the place of employment. *Hills v. Blair*, 182 Mich. 20; *Hopkins v. Michigan Sugar Co.*, 184 Mich. 87.

In particular circumstances the Michigan court has made exceptions to the general rule stated above. In *Beaudry v. Watkins*, 191 Mich. 445, a boy was employed by a laundry as a delivery or errand boy, and, on returning from lunch at home, at noon, on his bicycle, caught on a motor truck, was thrown and was run over by another vehicle. He had received permission to go home to his lunch on this occasion,

getting a package on his way and returning with it afterwards. *Held,* that the accident arose out of and in the course of his employment. In *Kunze v. Detroit Shade Tree Co.,* 192 Mich. 435, Kunze was a foreman, tree trimmer, and planter, whose duty was to go from job to job in Detroit, and while presumably about to take a street car to proceed on his way from one job of inspection to another he was struck by an automobile and fatally injured. *Held* compensable. In *Clifton v. Kroger Grocery & Baking Co., supra,* plaintiff was instructed to take home at night for safe-keeping all money received after banking hours. Where, while so doing, he was struck by an automobile and injured, it was held that the accident arose out of and in the course of his employment.

Appellant relies particularly on three Minnesota cases, in which compensation was denied: *State v. District Court of Hennepin County,* 144 Minn. 259, where relator's husband, who furnished his services and his team and running gears of his wagon to Minneapolis for driving a sprinkling wagon from eight in the morning to five in the evening, and was killed by one of his horses while caring for it one evening in the stable; *Simonds v. Reigel,* 165 Minn. 458, where plaintiff's husband, a teamster in a gravel pit four miles from his home, leaving his team to be fed by another, at noon went on a truck of another loaded with gravel from the pit to his home, and was killed near his home while attempting to get off the truck before the driver had stopped it; and *Jotich v. Village of Chisholm,* 169 Minn. 428, where an employee with his own team, hauling dirt at a stated price per day or hour, drove at noon from the place of work, about a mile distant, to eat and feed his team, and while unhitching his team suffered an accidental injury. In all three of these cases compensation was denied.

It may be truly said that the ultimate judgments in these cases resulted from the court's interpretation and application of the Minnesota statutes by which the words "arising out of and in the course of employment" are further modified by statute denying compensation to employees "except

while engaged in, on, or about the premises where their services are being performed, or where their service requires their presence as a part of such service at the time of the injury, and during the hours of service of such workmen." Gen. St. Minn. 1913, sec. 8230 (i); Mason's Minn. St. 1927, sec. 4326 (j). Our statutes are almost identical with the Minnesota statute. By section 3075, Compiled Statutes of Nebraska 1922, defining the terms used, and by subdivision (c) thereunder, the term "personal injuries arising out of and in the course of employment" is declared "not to cover workmen except while engaged in, on, or about the premises where their duties are being performed, or where their service requires their presence as a part of such service at the time of the injury, and during the hours of service of such workmen."

Thus, it appears that the cases are not harmonious. The Minnesota cases, cited by appellant, to which we have referred are not reconcilable with the claims of the appellee. However, in view of our decision in *Tragas v. Cudahy Packing Co., supra,* we have committed ourselves rather definitely to the view that, if the work at which an employee is engaged when injured is incidental to his employment, his injury should come under the act. There, as here, the injury happened at the noon hour, and occurred on the workman's own time, for which he was not paid. There it occurred on the premises of the employer. Here, it is true, it did not occur at the place of work, but that was a mere incident due to the fact that the dragging on the county road, on that particular day, happened to be near the home of the employee, so that he ate at home and fed the team there for convenience. If the work had been a few miles or more distant, he would have taken his lunch and feed for the horses and would have fed them right at the place of employment. They could not have been fed on the road itself. At the home they were little more removed from the exact place of work than if on the roadside. The team was hired and paid for separately. The evidence shows that, while Speas furnished the team, yet it was owned by his son. We

state this as a fact and not for the purpose of basing any argument upon it. Speas was paid by the county for the use of the team. It was the duty of Speas to feed the team. It was implied in his contract of employment that he would feed them at noon. It was as important to feed them in preparation for the afternoon's work as it was necessary for Tragas to have a sharp chisel for the purpose of cleaning out the pans on which he was working during regular working hours. Tragas could have sharpened the chisel during the hours for which he was paid instead of taking a portion of his hour for rest or refreshment thus to further his employer's business. Speas could not both feed the team and eat his own lunch while the team was working. If, while working the team on the road, something had gone wrong with the harness and he had been kicked by the horse while adjusting the harness, or if, while unhitching or feeding the team right at the place of work, he had been so kicked, this would seem to be a stronger case than the *Tragas* case. The foreman, under whom Speas worked, and plaintiff also, testified that it was customary for Speas to take the horses home to feed them while on this job of dragging near his place. The work extended past his home on the day in question, and he stopped right there for the noon hour, drove into the yard, and unhitched. A moment afterward he was injured. To say that his employment ceased before all of the horses reached their stalls, or that it ceased during the usual hour for feeding, is to draw a very strict line against the employee. The compensation law is to be liberally interpreted in favor of the workman. The county commissioners and the foreman, as shown by the evidence, thought the employee was entitled to compensation and the county at all times expected to pay it. It seems to us that the logic of the situation requires that we either conclude that Speas was entitled to compensation or that we overrule the *Tragas* case. We are satisfied with the latter case, and therefore conclude that, on the merits, Speas was entitled to recover; that his feeding the team at the place of his injury was incidental to his employment and that his injury was received in the course thereof.

The only other question is the claim that the statute of limitations barred the suit. The county itself at all times recognized liability. Speas received hospital service and medical service, and it was expected that the bills would be paid by the county and that he would receive personal compensation. The county was covered by insurance and turned the matter over to the insurance company to pay. In the meantime, more than a year went by before a petition was filed. The injury occurred October 4, 1926. The petition was filed with the compensation commissioner January 9, 1928. The insurance company, defending for the county, claims that this came too late under the second clause of section 3061, Comp. St. 1922, requiring the petition to be filed "within one year after the accident." Speas pleaded that he filed his claim for compensation in December, 1926, and that it was agreed between plaintiff and defendant that plaintiff was entitled to compensation and that his medical expenses would be paid, but that the insurer fraudulently induced him not to file his petition and represented as late as September 16, 1927, that his claim was being taken care of and would soon be paid and never denied liability until after November 17, 1927.

Plaintiff introduced two letters written to him on the letter-heads of the insurance company by counsel for appellant who argued the case before us. One of these letters, dated September 2, 1927, asked why Speas went to two doctors, one at St. Edwards and one at Columbus, both of whose bills he had received; the other letter, dated September 16, 1927, said, quoting it in full: "I have your letter of recent date and I am about to close your claim. Will you kindly advise me by return mail the date upon which you were able to return to work after your accident?"

After hearing the evidence, the district court found that the county "had agreed to the payment of compensation to the plaintiff prior to the expiration of one year from the date of the injury and that this action is not barred."

The insurance company is not a party to the suit. If it were, and had a right to defend on the merits of the suit

as against it, we might consider whether, after its conduct and correspondence, it might equitably and justly assert the statute of limitations. It pretended to be about to close up plaintiff's claim and to pay his compensation when the year was expiring. It lulled him into inaction until a year from his injury had passed. To have filed a petition when the county had admitted liability, and when the insurer of the county had in turn in effect admitted its liability to the county and had declared its intention to pay, would have been to do a useless and annoying thing both against the county and its insurer. So we agree with the finding of the district court that the county had agreed to pay the compensation prior to the expiration of one year from the date of the accident, and therefore the plea of the statute of limitations is of no avail under the first clause of section 3061, Comp. St. 1922, which says: "Shall be forever barred unless, within one year after the accident, the parties shall have agreed upon the compensation payable under this act." To hold otherwise, in the circumstances of this case, would be to adopt a policy that would defeat the real purpose of the act. *Parson v. Murphy*, 101 Neb. 542; *Baade v. Omaha Flour Mills Co.*, 118 Neb. 445. This last case aptly says: "This jurisdiction has repeatedly held that the workmen's compensation act 'is one of general interest, not only to the workman and his employer, but as well to the state, and it should be so construed that technical refinements of interpretation will not be permitted to defeat it.' "

The plaintiff was allowed an attorney's fee of $50 in the district court. He ought to be allowed a fee of $100 in this court.

For the reasons stated, the judgment of the district court is affirmed, and the plaintiff is allowed an additional fee of $100 for services of his attorneys in this court, the same to be taxed as costs.

AFFIRMED.

REDICK, District Judge, dissenting.

I am compelled to dissent from the opinion in this case, and will briefly state my reasons therefor.

By our statute "personal injuries arising out of and in the course of employment" is declared "not to cover workmen except while engaged in, on or about the premises where their duties are being performed, or where their service requires their presence as a part of such service at the time of the injury, and during the hours of service of such workmen." Comp. St. 1922, sec. 3075. It seems to me that a proper construction of this provision precludes an allowance of compensation to plaintiff. It is evident, to my mind, that the words, "in some work for the employer," or others of like meaning, are understood after the word "engaged." It seems self-evident that the mere fact that he was in, on or about the employer's premises, but engaged in some act entirely disconnected with his service, would not entitle him to compensation for injuries received as the result of, or incident to, such act, as, for instance, cleaning his nails, a personal altercation with a visitor, or many other occurrences which will readily come to mind. The act which produced the injury must be one required to be done in performance of work for the master, and as a part of that service, not one which it was his duty or pleasure to perform regardless of his employment. The act being performed must be one required by the nature of the employment or so incident to it that it may reasonably be considered a part of the service; and there must be a causal connection between the services due the employer and the injury. There is no more causal connection between the work of dragging the roads and feeding the horses than there is between dragging the road and feeding the employee. It would seem that no one would claim as compensable an injury received by the employee while eating his lunch, occasioned by a fall of plaster from the ceiling, and yet it was just as essential to the performance of the employer's work that the employee be fed as that the horses be fed. To put it plainly, the horses were fed, not because the employee was engaged in dragging the roads for the county, but absolutely independent of that fact. They would have been required to be fed just the same if the plaintiff had been intending to

hitch them to a plow on his farm or for any other purpose for which their services were needed, or, in fact, if they were to remain in their stalls all day. The fact that the team and driver were employed for the purpose of dragging the roads does not convert the service of the driver in feeding and taking care of his team into a service for the master, for, as above suggested, such service was independent of the employment, and was required merely that the employee might fulfill his contract. He might as well have used other horses, oxen, or an auto-truck. He had no hours of service, but was paid by the mile. If it had rained before or after the injury, he could not have performed the work of dragging the roads. In short, it seems an unwarranted stretch of language to say that in feeding his own horses, which he would have been required to do in any event, he was engaged in the service of the master.

The strongest argument advanced for allowance of compensation is that, if the plaintiff had been several miles from home at the noon hour and had simply driven his team to the side of the road to feed them and partake of his own lunch, and had been kicked by one of the horses and received an injury, a compensable case would be presented. I recognize the force of the illustration; but, assuming the correctness of the conclusion stated, I apprehend that the situations may be distinguished as the supposed situation may come within that portion of the clause of the statute, "where their service requires their presence as a part of such service." In such case, the act of feeding the horses was so closely connected with the performance of the work that it might be considered as incident to and a part of it. Analogy is not always a dependable method of reasoning, and I think it is faulty here, for the reasons stated and because of the different circumstances of the situation.

I think the Michigan, Vermont and New York cases relied upon in the opinion are not controlling, for the reason that Michigan and New York, and, so far as I am able to discover, Vermont, have no statute limiting and defining the phrase "arising out of and in the course of employ-

ment." Moreover, many of those cases are distinguishable. In *Punches v. American Box Board Co.*, 216 Mich. 342, it was part of the servant's business to drive and care for the employer's horses. In *Derleth v. Roach & Seeber Co.*, 227 Mich. 258, stress is laid on the fact that the death occurred within the hours of service of the employee. In *Clifton v. Kroger Grocery & Baking Co.*, 217 Mich. 462, the employee was actually performing a service for the master at the time of his injury. In *Matter of Kingsley v. Donovan*, 155 N. Y. Supp. 801, the injury occurred during the hours of service, and while cleaning the motorcycle belonging to the employee, but used by him in the performance of his duties.

The case of *Brown v. Bristol Last Block Co.*, 94 Vt. 123, sustains the plaintiff's contention, but *Kneeland v. Parker*, 100 Vt. 92, in which compensation was refused, is not distinguishable in principle from the case at bar, though the facts are somewhat dissimilar.

Finally, it is suggested by the opinion that, in order to reverse this case, it will be necessary to overrule the case of *Tragas v. Cudahy Packing Co.*, 110 Neb. 329. I think that case is clearly distinguishable by the fact that Tragas was engaged in work solely attributable to the fact of his employment. The sharpening of the chisel would not have been undertaken by him but for the fact that it was to be used exclusively in the performance of the work for which he was employed. Furthermore, the chisel belonged to the employer and was an instrumentality specially supplied for the use of the servant. The feeding of the horses in the present case was an independent transaction, and was required to be done regardless of the service due his employer and not because of such employment.

For the above reasons, I respectfully dissent from the opinion of the court.

Note—Workmen's Compensation Acts, C. J. sec. 34 n. 95, sec. 63 n. 76, sec. 65 n. 86, sec. 72 n. 25, sec. 73 n. 43, sec. 103 n. 46; 28 R. C. L. 797; 5 R. C. L. Supp. 1568; 6 R. C. L. Supp. 1756; 7 R. C. L. Supp. 1005; 38 A. L. R.

1041; 48 A. L. R. 1400; 28 R. C. L. 804; 4 R. C. L. Supp. 1858; 7 R. C. L. Supp. 1007.

IN RE ESTATE OF GEORGE FRED MARCONNIT.
ELIZABETH CLARKE, APPELLANT, V. FRED P. MARCONNIT, EXECUTOR, APPELLEE.

FILED OCTOBER 25, 1929. No. 26734.

1. **Executors and Administrators**: REMOVAL. Where an executor is personally interested in the administration of an estate and in the disposition of the property which is to be distributed under the terms of a will, and which is then presently in the course of litigation, and the circumstances disclose that the interests of the executor are clearly such as to prevent his performing the duties connected therewith in an impartial manner, such executor should be removed and another appointed in his stead.
2. ———: ———. Where an executor's personal interests conflict with or are antagonistic to his duties as executor, he is not a proper person to act as such, and on proper application should be removed.
3. ———. "An administrator is a quasi trustee, and should be a person who is not interested adversely to the estate in property which is the subject of administration, and who will, while carefully guarding the interests of the estate, stand at least indifferent between it and claimants of the property." *In re Estate of Mills*, 22 Or. 210.

APPEAL from the district court for Douglas county: HERBERT RHOADES, JUDGE. *Reversed.*

R. M. Switzler, Sterling F. Mutz and *Edward C. Fisher*, for appellant.

Benjamin S. Baker and *Ralph P. Wilson, contra.*

Heard before GOSS, C. J., ROSE, DEAN, GOOD, THOMPSON, EBERLY and DAY, JJ.

DEAN, J.

George Fred Marconnit died in Omaha, October 8, 1924, leaving him surviving his widow, Mary Marconnit, a daughter, Elizabeth Clarke, plaintiff herein, and a son,

Fred P. Marconnit, defendant herein, as his sole surviving next of kin. It is alleged by plaintiff that her father left an estate consisting of land and personal property approximating $250,000 in value. By the terms of a will the defendant and his mother were jointly appointed executor and executrix, respectively, of the Marconnit estate. September 7, 1926, the decedent's wife died, and the defendant became, and was thereafter, the sole executor. Some time thereafter Elizabeth Clarke made application for the removal of her brother as executor and prayed that some disinterested person be appointed to take his place, but the court denied her plea. Thereupon plaintiff appealed from the court's decision in the premises and likewise from the court's approval of the executor's final report.

The plaintiff alleges that defendant has wholly failed to account for large sums of money arising, in part, from the proceeds of the rental of certain valuable tracts of land of which the testator died seised, and that he failed to include in his report of the estate's assets certain notes and mortgages in a sum approximating $40,000 which were owned by her father.

The will by its terms provides that plaintiff shall inherit the homestead, of the approximate value of $4,000, and that, upon attaining the age of 45, she should receive the sum of $12,000 from her father's estate. When the suit was tried plaintiff was then past 45 years of age, but she alleged that she never received any part of the above named $12,000 bequest. The will also provides that the defendant, Fred P. Marconnit, shall inherit the real estate, but that it shall be subject to the payment to plaintiff of the $12,000 which was bequeathed by her father to her, and which, as above noted, was made a specific charge against the real estate. The will plainly and in specific terms provides: "For the purpose of carrying out the terms of this bequest I hereby give, bequeath and devise unto my said executors hereinafter named (the testator's widow and his son Fred) the said sum of twelve thousand ($12,000) dollars upon the terms and conditions stated in this item of

my will * * * my said executors hereinafter named shall hold said twelve thousand ($12,000) dollars and invest the same as above provided until my said daughter Lizzie Clarke reaches the age of forty five (45) years."

Some time in July, 1919, the senior Marconnit purported to convey certain farms located in Nemaha and Otoe counties to his son Fred. This was five years before his death. The will was written in 1909, and was ratified and confirmed in a codicil which was executed ten years thereafter, namely, in 1919, that being the same year in which the deeds were executed. The defendant, however, testified that he did not have the above named deeds recorded until the year after the death of his father, namely, in 1925, nor did he tell his sister about the deeds until several weeks after his father passed away. On this feature of the case the defendant testified:

"I had a feeling that as far as the record title was concerned I would rather leave it in my father as long as he lived. * * * The joint account of my father—that my father and I kept up, or that I kept up for my father—father had to have money to live on and I always kept in this joint account $3,000 or over subject to his drawing, so that whenever he wanted money or should want for money or need money that he could go and get it."

He also testified that he did not account to his father for rents or profits in any way but had absolute control of the farms.

Where an executor is personally interested in the administration of an estate and in the disposition of the property which is to be distributed under the terms of a will, and which is then presently in the course of litigation, and the circumstances disclose that the interests of the executor are clearly such as to prevent his performing the duties connected therewith in an impartial manner, such executor should be removed and another appointed in his stead.

Where an executor's personal interests conflict with or are antagonistic to his duties as executor, he is not a proper person to act as such, and on proper application should

be removed. On this feature of the present case see 2 Woerner, Law of Administration (3d ed.) 875; *Justice v. Wilkins*, 251 Ill. 13.

The rule is well stated in the case entitled *In re Estate of Mills*, 22 Or. 210, wherein the court made this observation:

"An administrator is a quasi trustee, and should be a person who is not interested adversely to the estate in property which is the subject of administration, and who will, while carefully guarding the interests of the estate, stand at least indifferent between it and claimants of the property."

Sufficient cause appears in the present case for the removal of the defendant as executor, and we hereby direct that he be removed and that some suitable person be appointed in his stead as administrator. It follows that the estate must be held *in statu quo* until another administrator is appointed and qualifies.

The judgment must be and it hereby is reversed and the cause remanded for further proceedings in conformity with the views herein expressed.

REVERSED.

CHARLES B. HARBIN, APPELLANT, V. DON L. LOVE, MAYOR, ET AL., APPELLEES.

FILED OCTOBER 25, 1929. No. 27143.

1. Injunction: TEMPORARY RESTRAINING ORDER: APPEAL: SUPERSEDEAS. In a case where a permanent injunction is denied by the trial court, a plaintiff is not entitled to a supersedeas as a matter of statutory right, unless at the time of the trial there is in effect a temporary injunction. A temporary restraining order cannot be continued in effect in such a case by supersedeas bond.
2. ———: ———. Whether the order in effect at the time of trial is a temporary restraining order or a temporary injunction is to be determined from the form and substance of the order, considered in connection with the entire record in the case.
3. ———: ———: CONTINUANCE. A continuance of the hearing

on a temporary injunction from the time provided in the restraining order is not sufficient, of itself, to convert a restraining order into an injunction. It is not a temporary injunction if it contemplates a hearing on the application as to whether a temporary injunction shall be allowed.

4. ———: ———: BOND. An order, which is a restraining order when granted, cannot in effect become an injunction without the giving of a new bond. The bond securing the restraining order does not give effect to the injunction and make it operative.
5. ———. The record in this case has been examined and the order in effect in this case at the time of trial *held* not to be a temporary injunction.
6. Appeal. This court will not consider the merits of the issue in a case, to be heard here *de novo*, upon a motion to fix supersedeas, where such consideration is neither necessary nor proper to a determination of said motion.

APPEAL from the district court for Lancaster county: FREDERICK E. SHEPHERD, JUDGE. Motion for allowance of supersedeas. *Motion overruled.*

Sanden, Anderson, Laughlin & Gradwohl, for appellant.

Frank A. Peterson, Lloyd E. Chapman, Max G. Towle and *Farley Young, contra.*

Heard before GOSS, C. J., ROSE, DEAN, GOOD, THOMPSON, EBERLY and DAY, JJ.

DAY, J.

This is a suit in equity brought originally in the district court for Lancaster county, Nebraska, for an injunction preventing the officials of the city of Lincoln and Lancaster county from seizing and confiscating certain vending machines and from interfering with the lawful operation of the same. The trial court found that the vending machines in question were gambling devices, and that an injunction should not be allowed, and dissolved the restraining order. The trial court denied plaintiff's application for a supersedeas bond.

Subsequently, the defendant filed a transcript in this court and a motion for supersedeas, supported by printed brief representing that the decree of the trial court dis-

solved a temporary injunction existing in favor of plaintiff. Relying upon this showing, an order of the court was entered sustaining motion for supersedeas and fixing the amount of the bond at $1,000. Upon a motion of defendants, this order was vacated, for the reason that the order entered in this court allowing a supersedeas was made upon motion without notice, which is contrary to the rules of the court. Thereupon the plaintiff filed a motion for a supersedeas and served notice on defendants. The defendants made a showing resisting the motion for the following reasons, which we will discuss in the order presented:

(1) That no temporary injunction was ever granted by the district court in this cause, but only a temporary restraining order, which was dissolved after a trial on the merits, and which restraining order cannot be superseded.

(2) That the slot machines which the appellant seeks to prevent the appellees from molesting are gambling devices and used for gambling purposes, and in which the appellant can have no property rights by law.

(3) That this court is without jurisdiction to grant a supersedeas herein for the reason that more than twenty days have elapsed since the entry of the final order in the cause in the district court.

As a matter of statutory right the plaintiff is entitled to a supersedeas bond upon the dissolution of a temporary injunction.

"In case of the dissolution or modification by any court, or any judge at chambers, of any temporary order of injunction which has been or may hereafter be granted, the court or judge so dissolving or modifying said order of injunction shall, at the same time, fix a reasonable sum as the amount of a supersedeas bond, which the person or persons applying for said injunction may give, and prevent the doing of the act or acts, the commission of which was, or may be sought to be restrained by the injunction so dissolved and modified." Comp. St. 1922, sec. 8751.

The force and effect of the supersedeas, if given, is defined by section 9141, Comp. St. 1922, as follows:

"No appeal in any case shall operate as a supersedeas, unless the appellant or appellants shall within twenty days next after the rendition of such judgment or decree, or the making of such final order, execute to the adverse party a bond with one or more sureties as follows: * * * When the judgment, decree or final order dissolves or modifies any order of injunction which has been or hereafter may be granted, the supersedeas bond shall be in such reasonable sum as the court or judge thereof in vacation shall prescribe, conditioned that the appellant or appellants will prosecute such appeal without delay, and will pay all costs which may be found against him or them, on the final determination of the cause in the supreme court; and such supersedeas bond shall stay the doing of the act or acts sought to be restrained by the suit, and continue such injunction in force until the case is heard and finally determined in the supreme court."

This court has held, under the provisions of these sections, that upon the dissolution of the temporary injunction at the trial plaintiff was entitled as a matter of statutory right to have the court fix the amount of a supersedeas bond. *State v. Baker*, 62 Neb. 840. At the time this court sustained the motion, *ex parte*, plaintiff contended, as he still contends, that a temporary injunction was in effect at the time of the hearing in the trial court. The court was then of the same impression, and if the record had sustained plaintiff's contention it would have entitled him to have a supersedeas bond fixed by this court. If, however, no temporary injunction was granted and if at the time of the trial a temporary restraining order was in effect, then the plaintiff is not entitled to a supersedeas. It is not the intention of the legislative act to give to a restraining order the force and effect which attaches to an injunction allowed upon a hearing in the case. The purpose of a restraining order is to suspend proceedings until the parties may be heard. *State v. Greene*, 48 Neb. 327.

It must therefore be determined, solely from the record, whether at the time the case was tried upon the merits in

the district court there was in force and effect a restraining order of a temporary injunction. A temporary restraining order is merely to preserve matters *in statu quo* until a hearing. *State v. Graves*, 82 Neb. 282. Such was the original order entered in this case. It provided for a bond, which was given until a hearing upon the temporary injunction.

The plaintiff contends that the temporary order granted in this case amounted to a temporary injunction. He contends that a temporary restraining order contemplates a hearing as to whether it will be supplanted by a temporary injunction. Upon the date set for the hearing in this case, upon the request of the defendants, the case was continued to be taken up "Friday, July 5, 1929, at which time case will be heard on its merits." Whether an order is a restraining order or a temporary injunction must be determined from its form and substance. 32 C. J. 28. Tested by this rule, the form and substance indicates that this was a temporary restraining order. If the order had restrained defendants absolutely without providing for a hearing upon the application, it would have been an injunction and not a temporary restraining order. *State v. Dungan*, 89 Neb. 738; *State v. Graves, supra.* The order in this case did provide for a hearing and did not operate as a temporary injunction unless perchance it was so converted by the order of the court continuing the hearing on said application until a day certain, and providing that on said day the case would also be heard on the merits. The record discloses that both parties asked for and secured continuances. In the stipulation between the parties, it was agreed by the parties that the whole case was to be decided, including the restraining order and interlocutory injunction. This, we submit, fairly indicates that it was the intention of the parties that the hearing on the application for a temporary injunction should be heard at that time. The attorneys for the plaintiff put this construction upon the record. In a motion for a continuance filed in the trial court on June 27, 1929, ten days after the

date set for hearing on the temporary injunction, they move the court that, "if this application be not granted, then only the matter of temporary injunction be considered and the matter of permanent injunction be not set for trial until at least Tuesday, July 2, 1929." If there were any ambiguities, which we think there are not, in the stipulation between the parties, the misunderstanding as to the condition of the record and the effect, on the part of plaintiff's attorney, arose at a later date.

Another reason occurs to us why the contention of the plaintiff is untenable. If, in this case, the trial judge, instead of continuing the hearing, had entered an order providing that this restraining order should become effective as an injunction, the statutes required a new bond to be given before it could be given effect. The bond given to secure the temporary restraining order would not give effect to the temporary injunction. *State v. Greene,* 48 Neb. 327. There is no contention that any new bond was given at the time plaintiff contends the restraining order became an injunction.

We are of the opinion that the order in effect at the time the case was heard by the trial court was a restraining order, and not a temporary injunction. Therefore the plaintiff was not and is not entitled to a supersedeas bond.

The second objection relates to the issue in this case. It is not a matter to be considered by the court upon this motion. The issue in this case is whether the vending machines in question are gambling devices. This case is to be heard *de novo* in this court, and to decide that question now would be to decide it without a hearing. It is not material, necessary, or proper to consider this question relative to the plaintiff's right to a supersedeas.

The question presented by the first objection having been decided in favor of defendants, it is not necessary for a disposition of this case to discuss the third objection. The plaintiff not having obtained a temporary injunction, and a permanent injunction having been denied by the trial court, his motion for a supersedeas bond is overruled.

SUPERSEDEAS DENIED.

PETER MEHRENS, APPELLEE, V. SAMUEL GREENLEAF, COUNTY ASSESSOR OF DOUGLAS COUNTY, ET AL., APPELLANTS.

FILED NOVEMBER 2, 1929. NO. 27124.

1. **Municipal Corporations.** "A municipal corporation is, so far as its purely municipal relations are concerned, simply an agency of the state for conducting the affairs of government, and as such it is subject to the control of the legislature." *Williams v. Eggleston*, 170 U. S. 304.
2. **Constitutional Law: INTANGIBLE TAX LAW: VALIDITY.** Chapter 168, Laws 1929, construed, and *held* not to contravene that part of section 14, art. III of our Constitution, which provides: "No bill shall contain more than one subject, and the same shall be clearly expressed in the title. And no law shall be amended unless the new act contain the section or sections as amended, and the section or sections so amended shall be repealed."
3. ———: ———: ———. Further, the 1929 act does not violate that part of section 7, art. VIII of the Constitution, providing: "The legislature shall not impose taxes upon municipal corporations, or the inhabitants or property thereof, for corporate purposes."
4. **Municipal Corporations: INTANGIBLE TAX LAW: "GENERAL FUND."** The words "general fund," as they appear in the act of 1929 referring to cities and villages, mean a fund which is set apart for the purpose of defraying the governmental expenses of the city or village, and not those expenses which are termed "corporate."

APPEAL from the district court for Douglas county: FRANCIS M. DINEEN, JUDGE. *Reversed and dismissed.*

C. A. Sorensen, Attorney General, and *George W. Ayres,* for appellants.

Ziegler & Dunn, contra.

Heard before GOSS, C. J., ROSE, DEAN, GOOD, THOMPSON, EBERLY and DAY, JJ.

THOMPSON, J.

The plaintiff, appellee herein, a resident taxpayer of Douglas county, sought to enjoin the defendants, appellants, from enforcing the provisions of chapter 168, Laws 1929, which provide for the classification and taxation of

intangible property and the distribution of the funds raised by such taxation. The trial court found that the above act contravened section 14, art. III, and section 7, art. VIII of our Constitution, and judgment was rendered in favor of plaintiff, to reverse which defendants appeal.

The first of the above findings, after quoting the title of the 1929 act, is as follows: "That section 5884, Compiled Statutes for 1922, to which House Roll 421 (chapter 168, Laws 1929), by its title, professes to be an amendment, was repealed by chapter 169, Laws 1927. That House Roll 421 does not purport to be an independent act, but its purpose, as expressed in the title to said act, is amendatory. That said House Roll 421 actually undertakes to amend chapter 169, Laws of 1927, and not being an independent act and not referring to chapter 169, Laws of 1927, except as an amendment to section 5884 of the Compiled Statutes of Nebraska for 1922, and not undertaking to repeal said chapter 169, Laws of 1927, by purporting to repeal said section 5884, of the Laws of 1922, it violates section 14, article III of the Constitution."

Section 14, art. III of our Constitution, so far as material here, reads as follows: "No bill shall contain more than one subject, and the same shall be clearly expressed in the title. And no law shall be amended unless the new act contain the section or sections as amended, and the section or sections so amended shall be repealed."

The original section 5884, Comp. St. 1922, was a part of a comprehensive act carried into such statutes as chapter 61 thereof, entitled "Revenue." This section 5884 was amended and the original section repealed by chapter 165, Laws 1925, and, as is customary, the section as amended carried the original number "5884," subdivided into parts "(a)" and "(b)." This 1925 act also repealed section 5887 of such Compiled Statutes of 1922.

By chapter 169, Laws 1927, we find the 1925 law repealed, and a new act, complete in itself, passed, with the following title: "An act to provide for the classification and taxation of intangible property; to provide for the

distribution of funds raised by such taxation; to repeal section 5884, Compiled Statutes of Nebraska for 1922, as amended by chapter 165, Session Laws of Nebraska for 1925, relating to the taxation of intangible property; and to declare an emergency." The repealing clause of such 1927 act provides: "That said original section 5884, Compiled Statutes of Nebraska for 1922, as amended by chapter 165, Session Laws of Nebraska for 1925, and all acts and parts of acts in conflict herewith, are hereby repealed." Section 5884, as used in the above quoted title and repealing clause, did not mean, nor could it by any reasonable hypothesis have been intended to mean, the original section 5884 of the Compiled Statutes of 1922, but plainly meant, and was intended to mean, section 5884 as it stood after being amended by the act of 1925.

The act of 1927 was in full force and effect, complete in itself, and a proper subject of repeal, at the time the 1929 act was introduced and being considered. In *Kelkenny Realty Co. v. Douglas County*, 116 Neb. 796, 800, we said: "This act (that of 1927) was not amendatory; it is complete in itself, and repealed all prior acts on the same subject." This statement is but a logical deduction from the title of the act itself, and is approved.

True, the title of the 1929 act provides: "An act to amend section 5884, Compiled Statutes of Nebraska for 1922, as amended by chapter 165, Laws of Nebraska for 1925, as amended by chapter 169, Laws of Nebraska for 1927, relating to revenue and taxation; to provide for the classification and taxation of intangible property, and for the distribution of the funds raised by such taxation; to provide penalties for the violation thereof; to repeal said original sections; and to declare an emergency." And the repealing clause of such act states: "That section 5884, Compiled Statutes of Nebraska for 1922, as amended by chapter 165, Laws of Nebraska for 1925, as amended by chapter 169, Laws of Nebraska for 1927, are hereby repealed." However, it certainly could not be said that the act of 1929 attempted to amend or repeal a section that

had been repealed by the act of 1925 (not by the act of 1927 as stated by the trial court), or to do other than to supplant, in an amendatory way, sections 1 and 2 of the act of 1927, which superseded section 5884 subdivided into parts "(a)" and "(b)" of the act of 1925.

Thus, we conclude that, considering the act of 1929, as outlined in its title, the intention of the legislature obviously was to amend the body of the act of 1927, as evidenced by sections 1 and 2 thereof, and to supplant the provisions of the act in question, and to repeal such original sections 1 and 2 of the 1927 act. Further, considering the act of 1929 in its entirety, it cannot reasonably be said that it contained more than one subject; nor that its title failed to clearly express such subject; nor that such title or act amended or repealed, or attempted to amend or repeal, the original section 5884 as it stood in the Compiled Statutes of 1922, or as it stood in the act of 1925; nor that it was not sufficiently indicative of that which was sought to be amended as well as that sought to be repealed; nor that any one was misled or in any manner deceived by the use of the words "as amended by chapter 169, Laws of Nebraska for 1927," in the title of the 1929 act, as well as in the repealing clause thereof, instead of the words "as changed and repealed by chapter 169, Laws of Nebraska for 1927;" nor that the act was in any manner inducive of surreptitious legislation. Hence, neither the title nor the body of the act in question contravene that part of section 14, art. III of our Constitution, hereinbefore quoted, either as found by the trial court or otherwise.

In thus concluding, we have but followed rules of general application, and especially the uniform holdings of this court. In *State v. Board of County Commissioners,* 109 Neb. 35, 38, we went so far as to state: "Though the 1921 act purports to amend chapter 66, Laws 1919, and ignores the amendatory act, chapter 67, Laws 1919, such mistaken reference to the former statute, without express mention of the subsequent amendatory act, does not invalidate the act, for there is sufficient identification of the previous

existing law sought to be amended to make certain the legislative intention. *State v. Babcock*, 23 Neb. 128; *Fenton v. Yule*, 27 Neb. 758; *Richards v. State*, 65 Neb. 808; notes, 5 A. L. R. 996, 1009." See, also, *Elliott v. Wille*, 112 Neb. 78; *In re Estate of Austin*, 116 Neb. 137; *State v. Farmers Irrigation District*, 116 Neb. 373; 25 R. C. L. 869, 870.

The second finding of the trial court, so far as material, is as follows: "Upon the filing by the taxpayer of the schedule required under said act, the tax is computed and levied without formal action by any assessment body, and is, therefore, levied by legislative decree.

"The act provides that the tax shall be apportioned to the general fund of the city. There is no 'general fund' to the city of Omaha, and if the phrase 'general fund,' as used in this act, has any special significance so far as metropolitan cities are concerned, the tax so collected should be credited to the 'miscellaneous expense fund' of the city. This fund is to pay expenses of the city, and, as thus used, would be for the payment of expenses incurred in its corporate capacity; otherwise, the tax so collected would become a part of the general fund of the city, and be distributed and apportioned by the city authorities the same as other revenue. In any event, the tax so collected would be used in part, at least, by the city for corporate purposes. To that extent, House Roll 421 (the act of 1929) violates section 7, article VIII of the Constitution."

The material parts of the 1929 act, pertinent here, are, in substance: Section 1 defines intangible property and divides the same into classes A and B, and then provides: "All intangible property as defined in Class A shall be taxed where said intangible property is assessed at two and one-half mills on the dollar of the actual value thereof. * * * Class B shall include all other kinds of intangible property named in this section which is not included in Class A. All intangible property in Class B shall be taxed where said intangible property is assessed at the rate of eight mills on the dollar of the actual value thereof, the

same to be assessed and collected where the owner resides:" That the aforesaid mill levies shall be in lieu of all other taxes upon such intangible property, and shall be due, delinquent and collectable at the same time as personal taxes, "and the amount collected in the various taxing districts of the state shall be apportioned, one-sixth to the state general fund, one-sixth to the county general fund, one-third to the general fund of the city or village, one-third to the general fund of the school district in which the property is assessed."

That part of section 7, art. VIII of our Constitution, here involved, is: "The legislature shall not impose taxes upon municipal corporations, or the inhabitants or property thereof, for corporate purposes."

In *Williams v. Eggleston*, 170 U. S. 304, it was state: "A municipal corporation is, so far as its purely municipal relations are concerned, simply an agency of the state for conducting the affairs of government, and as such it is subject to the control of the legislature."

Considering the first paragraph of the second finding: As we construe the law, the return is made by the owner, or his agent, and filed with the county assessor, who either accepts the listed statement of the property and its asserted value as designated in such return, or on investigation, by and with the consent of the owner, changes it, and in any event transmits the true situation as found by him, as a part of his completed work, to the county board sitting as a board of equalization, for such board's consideration; the value and amount of both the tangible and intangible property being open to correction if the board, under the rules governing its deliberation, should find it necessary. Thus, the legislature does no more than provide the way or manner of such taxation, the per dollar mill levy, and the distribution of the tax when once collected. It is therefore apparent that the tax is "computed and levied" by the formal action of an "assessment body."

As to the second paragraph of such finding: The words "general fund," as used in that part of the 1929 act re-

ferring to cities and villages, mean a fund which is set apart for the purpose of defraying the governmental expenses of the city or village, and not those expenses which are termed "corporate." The legislature, having designated the fund into which these taxes should go, must have had this construction in mind, as it certainly could not be presumed that the legislature was attempting to contravene the provisions of the Constitution heretofore quoted; neither could it be presumed that the city or village authorities would place these taxes in a fund other than that designated by the act, nor that in making appropriations they would provide that this fund be used for a different purpose than that plainly specified in such act. Therefore, it would be immaterial whether the authorities of the city or village actually named the fund "general" or "miscellaneous expense," as either thereof would refer to the same moneys.

In further support of the conclusions hereinbefore reached as to the constitutionality of the act in question, we might add that a legislative act is always presumed to be within constitutional limitations unless the contrary is clearly apparent—a rule consistently followed by this court. However, the people, ever alert, and jealous of their vested rights, in 1920 adopted as an amendment to the Constitution of our state, as an additional safeguard, the following provision: "No legislative act shall be held unconstitutional except by the concurrence of five judges"—five-sevenths of the membership of the court as then and now composed.

The judgment of the trial court is reversed, and the action dismissed.

REVERSED AND DISMISSED.

Note—Municipal Corporations, 43 C. J. sec. 288 n. 9, sec. 306 n. 46—Statutes, 36 Cyc. 1026 n. 17, 1044 n. 99, 1060 n. 76; 25 R. C. L. 869; 5 A. L. R. 997 et seq.; 25 R. C. L. 907.

STATE, EX REL. C. A. SORENSEN, ATTORNEY GENERAL, APPELLANT, V. GEORGE A. KISTLER, APPELLEE.

FILED NOVEMBER 2, 1929. NO. 26954.

1. Trial: EVIDENCE: COMPILATION OF RECORDS: ADMISSIBILITY. Where the original books and records are in court subject to inspection of counsel, a compilation of their contents, made by a witness competent to do so, is competent evidence as against an objection as "incompetent and no foundation laid," there being no specific objection that the records themselves were not offered in evidence.
2. Animals: INSPECTION: SUFFICIENCY OF EVIDENCE. Evidence examined, and *held* to show a "systematic inspection, examination and testing of cattle," within the meaning of those terms in section 10, art. II, ch. 12, Laws 1927.

APPEAL from the district court for Adams county: J. W. JAMES, JUDGE. *Reversed, with directions.*

C. A. Sorensen, Attorney General, and *Peterson & Devoe,* for appellant.

Bernard McNeny and *Raymond M. Tibbets, contra.*

Heard before GOSS, C. J., ROSE, DEAN, GOOD, THOMPSON and EBERLY, JJ., and REDICK, District Judge.

REDICK, District Judge.

This is an action brought by the state of Nebraska, on the relation of the attorney general, against the defendant, to enjoin the latter from obstructing or preventing the agents of the state from applying the tuberculin test to defendant's cattle. The petition alleged that prior to the enactment of chapter 12, Laws 1927, a systematic inspection, examination and testing of cattle for tuberculosis was undertaken in Adams county, Nebraska, on a cooperative basis by the United States bureau of animal industry and the Nebraska department of agriculture, and more than 5,000 cattle were thereby tested in Adams county; that on January 6, 1928, said department duly declared Adams county to be an area for inspection of breeding cattle for tuberculosis, pursuant to the said chapter 12, and partic-

ularly section 10 thereof, the order of declaration reciting that prior to the passage of said act a systematic inspection and testing of said cattle for tuberculosis was undertaken in said county on a cooperative basis by the United States bureau of animal industry and the Nebraska department of agriculture, and that more than 5,000 cattle were tuberculin tested; that defendant refused to submit the cattle owned and kept by him in Adams county to the test, and prevented the agents of the state from carrying on the same; that since said enactment 13,763 cattle have been tuberculin tested in said county. The answer of the defendant denies generally and specifically each allegation of the petition, and a general denial was filed in reply.

The case was tried to the court, and upon the conclusion of plaintiff's testimony the relief was denied the plaintiff by the court, and the action dismissed. Plaintiff appeals.

The sole question for our determination is the construction of section 10, art. II, ch. 12, Laws 1927, which is as follows:

"Where any county has been declared an area for the inspection, examination and testing of cattle for tuberculosis under the provisions of any preexisting legislation of this state, or where, prior to the passage of this act, a systematic inspection, examination and testing of cattle for tuberculosis has been undertaken in any county on a cooperative basis by the United States bureau of animal industry and the Nebraska department of agriculture, and more than five thousand cattle have been tested in such county prior to the passage of this act, the inspection, examination and testing of cattle for tuberculosis in such county or counties may be continued by the department under the provisions of this act without petition or hearing in all respects as if such petition had been filed and hearing had and the county declared an area hereunder."

A brief review of the legislation on this subject may aid in construing this section and thereby determining the legislative intent. By section 6, art. XX, ch. 190, Laws 1919, authority was given the department of agriculture to

quarantine or destroy all live stock found in the state and having an infectious or contagious disease. It was not until chapter 7, Laws 1925, that provision was made for the establishment of areas of inspection and systematic inspection of cattle for tuberculosis was provided for by legislative act. That act, though less complete, was quite similar to the act of 1927, providing for the establishment of county areas of inspection upon petition of 60 per cent. or more of the owners representing 51 per cent. of breeding cattle as disclosed by the last assessment rolls; and by section 9 it was attempted to provide for the establishment of such area without petition where the area plan of tuberculosis eradication had been theretofore adopted by the department of agriculture. Section 9, however, was declared unconstitutional, as not within the title of the act, in *State v. Heldt*, 115 Neb. 435, and, apparently to meet the views expressed by the court in that case, the act of 1927 was passed; section 10 covering substantially the same ground as section 9 in the previous act. No question of the constitutionality of the present act is presented.

From an examination of the act of 1927, it is clear that the jurisdiction of the department was intended to be based upon either of two situations—(1) where an area had been established by petition as provided by section 1, art II, of the act, and (2) where, prior to the passage of the act, a systematic inspection, examination and testing of cattle for tuberculosis has been undertaken in any county on a cooperative basis by the United States bureau of animal industry and the Nebraska department of agriculture, and more than 5,000 cattle have been thereby tested, in which case no petition was required.

It is established by the evidence beyond dispute that in the years 1921 and 1922 the United States bureau of animal industry and the state department of agriculture, cooperating, conducted a tuberculin inspection and examination of 8,772 cattle in Adams county, of which 6,543 were tested in 1922, and this is the inspection and examination referred to in the recital of the order of January 6, 1928, above referred to.

It is therefore apparent that, if the recitals of the order are true, the department of agriculture was fully justified in demanding an inspection of defendant's cattle, but the defendant contends that the evidence fails to show a "systematic inspection and examination" within the terms of the statute, and quotes Webster's definition of systematic as "of, pertaining to, or consisting in, system," etc. We think, however, that we will get a better idea of the meaning of the adjective from the definition of the noun. System is defined in the Standard Dictionary as "orderly combination or arrangement, as of particulars, parts, or elements, into a whole, especially, such combination according to some rational principle; * * * any methodic arrangement of parts." In common parlance, to do a thing systematically is to do it by a certain method previously adopted as tending to accomplish the desired result. It is distinguished from sporadic, haphazard, and disconnected acts having no tendency to constitute a complete and homogeneous whole.

The evidence shows that the inspection of 1921 and 1922 was carried on by the agents of the state and federal government. The method of operation was stated by witness Hayes, under whose supervision it was, to be as follows: "The arrangement of doing it in a systematic way was to go into the county, into the different precincts, and test in all of those precincts, completing the work in the different precincts as we went along." The results covered the number of herds, the number of cattle tested, the result of the test, the percentage of herds infected, and the percentage of cattle infected. The records of the department introduced in evidence show that such inspection was carried on for the purpose of covering the entire county, and according to a system or method adopted by the department. It was not a mere sporadic or occasional inspection of any particular "critter" or group of cattle suspected of or charged with being afflicted with tuberculosis, but was in pursuance of a general scheme to discover and eradicate that disease in a definite area—Adams county. We

are of the opinion that the inspection and examination referred to was a systematic one within the meaning of that term in the statute.

Objection was made to exhibit 2 as incompetent and no foundation laid. This was a compilation from the official records of the department of agriculture, made by the witness Hayes from original records which were present in court, and was competent; no objection being made that the records themselves were not introduced.

Defendant contends further that, because of the lapse of time from the inspection in 1922 to the passage of the act, the legislature could not have had in mind such an inspection. There is, however, no limitation in the act, and the only limitation which the court would be authorized to adopt regarding the time would be that it must be a reasonable time. It will be noted that, before an area for inspection may be considered established without petition, it must have been so declared under the provisions of preexisting legislation, but no such requirement exists under the second basis of jurisdiction, the language of the act being simply "where, prior to the passage of this act, a systematic inspection, examination and testing of cattle for tuberculosis has been undertaken," etc. We are not prepared to say that the period of time referred to is unreasonable, but think it quite probable that the legislature in enacting the section in question had in mind the organized efforts of the department, without specific legislation on the subject, to discover and eradicate the disease of tuberculosis among cattle, and in proper cases to eliminate the necessity of the somewhat cumbrous method by petition. The act of 1927, by section 10, was intended to preserve to the state and cattle-owners the benefit of such inspection as had been theretofore carried on in the manner required by the then act, and operated to constitute the counties so inspected protected areas, or put them in the same position as if the area had been created by petition under former legislation. Had there been such legislation in 1922 and Adams county had been created an area thereunder, there

could be no question of jurisdiction on account of the lapse of time. We think there is none here. Counsel for defendant argues that, because a new examination of the entire area is required owing to the lapse of time since the examination in 1922, petitions should have been obtained, which, he says, could easily have been done. But this is beside the point. If a systematic examination was made of the area in 1922, as we have attempted to show, a petition was not necessary, the area having been already established.

Defendant cites rule 5, paragraph 22, of the rules adopted for the assessment and maintenance of tuberculosis-free accredited herds of cattle, as establishing a limitation of three years beyond which no inspection of cattle may be considered of any effect. The material part of the rule is as follows:

"If as the result of one complete tuberculin test within the designated area, the total number of reactors is less than one-half of one per cent. of all the cattle within the area, the area shall then be declared an official modified tuberculosis-free accredited area for a period of three years by the cooperating federal and state authorities."

We can discover no relation between the rule and the legislation. The rule merely fixes the time under the conditions stated during which a retest may not be required. If the inspection of 1922 had been within three years of the present demand, it is possible the rule might have had some application, but we do not decide the point.

It is further argued that, by the use of the language "examination and testing of cattle for tuberculosis in any such county or counties *may be continued* by the department," the legislature referred to an action in progress, that "it is clear that it would be only an operation that was still in progress, that can be continued. It is only an examination begun and not completed to which the phrase 'may be continued' can be applied." We look upon this suggestion as rather technical. We think the power conferred upon the department of agriculture is a continuing

one, and that after having completed the inspection and examination of a certain area it might continue to inspect it as time goes on and conditions in the area require it; and this is the sense in which the word was used by the legislature.

We conclude that the learned district court was in error when it denied relief and dismissed the plaintiff's action, and its decree is reversed, with instructions to enter a decree for the plaintiff as prayed.

REVERSED.

CHARLES PENN V. STATE OF NEBRASKA.

FILED NOVEMBER 8, 1929. No. 26977.

1. **Homicide:** EVIDENCE: DYING DECLARATIONS: ADMISSIBILITY. "The admission of a dying declaration is, primarily, a question to be determined by the nature of each case." *Edwards v. State*, 113 Neb. 698.
2. ———: ———: ———: FORM. "The law looks to the substance rather than to the form, and it does not require that dying declarations must be made in any prescribed form or manner." *Edwards v. State*, 113 Neb. 698.
3. ———: ———: ———: WEIGHT AND CREDIBILITY FOR JURY. "Where dying declarations have been admitted in evidence, their weight and credibility are for the determination of the jury." *Edwards v. State*, 113 Neb. 698.
4. ———: ———: ———: ADMISSIBILITY. "In a prosecution for murder, the admissibility of a statement by the victim of the homicide that he was shot by defendant is a question of law for the court." *Johnson v. State*, 112 Neb. 530.
5. ———: ———: ———: ———. "In a prosecution for murder, a statement by the victim of the homicide that he was shot by defendant may be admitted in evidence, if made under a sense of impending death, and the foundation for its admission may be shown by circumstances." *Johnson v. State*, 112 Neb. 530.
6. ———: ———: ———: ———. "The time elapsing between the making of a dying declaration and dissolution is not necessarily a factor in determining the admissibility of the declaration as evidence." *Johnson v. State*, 112 Neb. 530.
7. **Criminal Law:** CHANGE OF VENUE. The matter of granting a

change of venue in a criminal case rests in the sound discretion of the trial court.

8. ———: ADJOURNMENT OF TRIAL. After the evidence was completed in a prosecution for murder in the first degree, a juror became too ill to continue the case and, upon the jury being properly admonished as to its duties, the trial was adjourned until the juryman should recover. The court reconvened and resumed the trial 26 days later and both the state and defendant were asked to examine the jurors to discover if any prejudice had resulted or would result by reason of the postponement. Defendant's counsel declined to examine the jurors but objected on his behalf to proceeding with the trial. *Held*, that the order overruling the objections was not an abuse of discretion or reversible error, where the record failed to show misconduct on the part of any juror or prejudice to defendant.

9. **Indictment and Information:** ELECTION. A defendant may be charged in one count with murder while attempting to perpetrate a burglary and in another count with murder, where both are parts of the same transaction. In such a case, the state is not required to elect to proceed to trial upon one of the counts but the defendant may be tried upon both.

ERROR to the district court for Merrick county: LOUIS LIGHTNER, JUDGE. *Affirmed.*

J. H. Grosvenor, E. J. Patterson and *P. S. Heaton*, for plaintiff in error.

C. A. Sorensen, Attorney General, and *Clifford L. Rein, contra.*

Heard before GOSS, C. J., ROSE, DEAN, GOOD, THOMPSON, EBERLY and DAY, JJ.

GOSS, C. J.

The defendant, Charles Penn (often called Pete), was convicted of murder in the first degree and the verdict of the jury fixed the penalty at life imprisonment. From a judgment thereon the defendant comes here on proceedings in error.

Charles Johnson died at a hospital in Columbus about 4:30 o'clock on the morning of October 4, 1928, as a result of a pistol shot or shots received by him about 11 o'clock on the night of October 2, 1928, at his blacksmith shop and public garage at Clarks. The defendant made his

home with his widowed mother, who lived in the same block in which Johnson conducted his business. Johnson and his blacksmith, Fred Hanson, lived in quarters on the second floor of Johnson's place of business, directly over the office. Penn and Johnson were friendly and Penn had long frequented Johnson's place and had opportunity to know that Johnson at times kept considerable sums of money about his office. In 1925 Penn had been convicted of breaking and entering and had served for a time in the penitentiary but had been paroled in October, 1927, to a farmer named Gerber, living near Clarks, and had been finally discharged in May, 1928. Mr. Gerber having died, the defendant continued to work for Mrs. Gerber. However, for the last six weeks he had not worked much, having had influenza.

Johnson was about his place of business on the afternoon involved and traded his used car for another and $25 in cash, with a customer, late in the afternoon. They celebrated the trade with a drink or two of liquor. He took his supper at Mrs. Penn's with Charles and others and later at night he and others went to this home and partook of an oyster stew. There was some drinking there in which Johnson and Penn probably participated. The testimony does not seem to show that either was intoxicated. Penn had no money and was given money by his mother to procure crackers for the feast. The defendant and his brother-in-law left the Penn home after the oyster supper at some indefinite time before 11 o'clock and Johnson left soon thereafter. At about 11 o'clock Johnson was wounded in his place of business. He received from a direction in front of him two shots from a 32-calibre pistol in his left arm and from the rear a shot entering on the left side of the spine and taking a course inward and upward through the abdomen but not leaving the body. Under the direction of Dr. R. R. Douglas of Clarks he was taken to a hospital at Columbus, where he arrived about midnight of the night of the shooting, and died about 4:30 in the morning of October 4, 1928.

The evidence shows that Johnson died from the effect of the bullet wound in the abdomen and that no pistol was found. As to the shooting, there is no direct evidence against Penn by any eye-witness, except as found in the statements of Johnson made, as argued by the state, under the sense of impending death. Plaintiff in error complains that these declarations were erroneously admitted in evidence.

Between 8 and 9 o'clock of the evening of October 3, 1928, being seven or eight hours before his death, Johnson signed in pencil a dying declaration, written in ink on two sheets of paper of letter size, in the handwriting of Emil F. Luckey, the county attorney of Platte county. Mr. Luckey testified that he had heard Dr. Morrow of Columbus, who attended Johnson at the hospital, inform Johnson that he could not survive and heard Johnson answer, "I am sorry but I guess you have done all you can for me." Mr. Luckey further testified:

"A. Well, I then asked Mr. Johnson if he had understood what Dr. Morrow had told him and he said he did, and then I asked him 'You realize that you are not going to live?' and he stated he did, and I told him, 'I have a statement here, Mr. Johnson, of the facts as they occurred last night of the shooting, given to me by Mr. Hawkins, and I would like to have you read them and, if they are correct, sign them.' And I then further told him, 'Would you rather have me read it for you and if there are any corrections you can give them to me?' and he stated that he would rather have me read the statement to him. I then proceeded to read the statement and I read it to him sentence by sentence and stopped at the end of each sentence and asked him if it was correct, and I don't recall, he made one or two corrections or changes in the statement and at the end of the statement I asked him, 'Is the statement, as you have corrected it, a correct statement now? and he said it was. And I asked him to sign it and he did. Dr. Morrow and myself signed the statement.

"Q. During this time, what did you observe as to Mr. Johnson's mental condition?

"A. Well, his mental condition seemed to be good. He was responsive to all questions. He was very responsive to the questions."

The written statement, being state's exhibit 1, follows:

"I Charles H. Johnson, having been advised by Dr. Frank Morrow that I will not recover from the bullet wounds I received Tuesday night, October 2, 1928, when I was shot by Charles Penn and myself fully realizing that death is at hand do hereby make this the following as a true statement of the facts concerning the shooting and my death:

"About 8:30 Tuesday evening October 2, 1928, I went over to the Penn home and was invited to partake of an oyster stew. Mollie Penn, Hiram Jones, Mark Lamb, Virgil Bane and Charles Penn were present at the oyster stew. Later Charles Penn, Virgil Bane and Mark Lamb left the house, leaving myself, Mollie Penn and Hiram Jones in the house. Soon following this I left and went to my garage and as I approached I saw Charles Penn's face through the window very clearly by the light of the office which I had turned on, searching through my office. I said to him, 'What are you doing there?' but he did not respond but ducked behind a brick flu located in the center of my office room. I pondered for a moment and thought that he might have got out the back way. Then I proceeded to unlock the front door, having been on the outside thus far, went in and proceeded to the corner of the flu when Charles stepped out with a revolver in his hand and I said to him again, 'What are you doing here, Pete? and no answer but he fired two shots in succession which struck me in the arm. I immediately turned to go out the door and upon turning another shot was fired which struck me in the back. I kept going the best possible and I heard another shot fired which did not hit me. I got to the corner of the Farmers Union Oil Station and Charles Penn was in my doorway and called to me, 'Come back here Charlie,' and I said, 'No; you will shoot me again,'

and he said, 'No; I wont.' I went back and he said, 'Charlie dont send me to the penitentiary,' and I said, 'No,' thinking he would shoot me again. He went to the telephone and called Dr. Douglas. When Charles fired the first two shots at me which struck my left arm I was standing only a few feet away from him and the lights were on and I could see him very plainly.

"(Signed) C. H. Johnson.
"(Signed) Emil F. Luckey.
"(Signed) F. H. Morrow."

The only changes Johnson caused to be made in the paper as first written by Mr. Luckey were three: First, they struck out the words "his own flash light" and interlined in lieu thereof the words "the office which I had turned on" after the words, still appearing, in the text "clearly by the light of." Second, they struck out the words "and turned on the light" after the words "went in" so that the text now reads "went in and proceeded to the corner of the flu(e) when Charles stepped out with a revolver in his hand." Third, there was another change by striking out five words, but it is inconsequential as they were an obvious repetition of five identical words, as often happens in writing by hand, as it often happens in using the typewriter, or occasionally may be seen in the use of the linotype.

Dr. Morrow testified that, in his opinion, at the time the document was read to the patient, his mind was clear. At other places in the record he expressed the opinion that Johnson was "perfectly rational," that he was not delirious although he had at that time a temperature of "101 and a fraction," that he was not suffering much pain at the time the statement was read to him, and that, while he was weak, the doctor did not think that "signing the statement made him very much more fatigued."

Plaintiff in error criticizes the admission in evidence of the written declaration because it was first reduced to writing on information furnished to the scrivener by another than the declarant and because of the effect of the

changes made and the consequent alleged inconsistencies in relation to the lights by which Johnson first identified his assailant at the office. These matters went to the weight and value of the evidence and were arguable to the jury with more force than to us. The chief purpose of the declaration was to identify the defendant. Quite independent of these items the statement contains evidence of identity to be considered by a jury along with other evidence. There is some corroboration of a portion of the declaration by a neighbor who was wakened by the shots on the fatal night. Henry A. Daniels, who lived across the street, heard the last two shots, listened and looked, finally saw two men, one of whom was Johnson and whose voice he recognized, walking toward the office, saw them go in and saw Johnson sit down in the chair with his left arm held out.

While sitting in the car, waiting to start from Clarks to Columbus, Johnson told Dr. Douglas and Kenneth L. Howe, the town marshal, who shot him. On the trial an objection to the doctor stating what Johnson said was sustained. When Howe was on the stand a like objection was sustained. But Howe gave without objection the following testimony as to what occurred about an hour after the shooting and shortly after Sheriff Curry had put the defendant under arrest: "Q. What did you say to the defendant at that time? A. I said to him, 'Mr. Johnson told me you shot him.' Q. And did the defendant say anything? A. Yes, sir. Q. What did he say? A. He said: 'That is it, Ex-convict. Take it all.'"

In *Edwards v. State*, 113 Neb. 698, the dying declaration was prepared in narrative form, read to the victim of an illegal operation and signed by her. We affirmed the action of the district court in receiving it in evidence over objections similar to those involved here. In that case we held:

"The admission of a dying declaration is, primarily, a question to be determined by the nature of each case.

"The law looks to the substance rather than to the form,

and it does not require that dying declarations must be made in any prescribed form or manner.

"Where dying declarations have been admitted in evidence, their weight and credibility are for the determination of the jury."

Substantially of the same nature and effect, in a case where a short written statement was prepared for another and signed by her, is *Mathews v. State,* 111 Neb. 593.

In a murder case, resulting in a conviction of manslaughter, we held: "In a prosecution for murder, the admissibility of a statement by the victim of the homicide that he was shot by defendant is a question of law for the court;" that the statement "may be admitted in evidence, if made under a sense of impending death, and the foundation for its admission may be shown by circumstances;" and "the time elapsing between the making of a dying declaration and dissolution is not necessarily a factor in determining the admissibility of the declaration as evidence." *Johnson v. State,* 112 Neb. 530.

It is needless to cite further authorities. These are recent and controlling. So, on this phase of the record, which is the chief point argued by the defendant, we hold that there was a proper foundation for the dying declaration, and its effect was for the jury to determine.

Complaint is made because the defendant was refused a change of venue. In the argument he relies upon *Olsen v. State,* 114 Neb. 112, wherein we reversed the judgment, with directions to grant a change of venue. There the record that the public sentiment of the community was aroused and that a general feeling of hostility against the defendant existed. We have examined the record and find that it shows no such condition here. The matter of granting a change of venue came under the well-established rule that it rested in the sound discretion of the trial court. We do not find that this discretion was abused.

The trial began on December 3, 1928. On December 7, 1928, as shown by the journal (on December 6 as indicated by a parenthetical note made by the reporter at a later

time in the bill of exceptions), it appeared that one of the jurors was ill. At the suggestion of the court the personal physician of the juror and the county physician examined him and reported him to be "on the edge of pneumonia and cannot possibly serve today and may not be able to serve for a week or ten days." Thereupon, under section 10150, Comp. St. 1922, the court carefully admonished "the jury as to its duties and the trial is adjourned to such time as the juryman recovers." The recovery of the juror took longer than had been anticipated, but on January 2, 1929, the juror had recovered and all parties reconvened to continue the trial. The court gave each party an opportunity to examine the jury. Thereupon let the record show what took place:

"Court: Does the defendant care to further examine the jury?

"Mr. Grosvenor: The defendant, Charles Penn, here objects to the resumption of argument and trial of this case at this date, to wit, January 2, 1929, for the reason that an unreasonable adjournment and delay has been occasioned during which time the jurors and each and all of them have been at large and outside the supervision and control of the court and in contact with the public generally, and have had means of and have acquired knowledge, information and other evidence of public opinion and expressions of other persons with reference to the status of the trial and the probable outcome thereof, all of which is highly prejudicial to the defendant and is calculated to deprive him of a fair and impartial trial such as is guaranteed by the Constitution and laws of the state of Nebraska.

"Court: Unless the defendant should examine the jury and it should appear that some prejudice has or would result, why, the motion will be overruled.

"Mr. Grosvenor: We don't care to examine.

"Court: The motion is overruled."

We have found no case identical with this, but *Ossenkop v. State,* 86 Neb. 539, is analogous in principle. This was

a manslaughter case. The point is well stated by the syllabus, as follows: "After the state had made its case in chief in a prosecution for murder in the second degree, an order permitting the jury, upon being admonished, to separate for the period of 21 days during a postponement allowed on the ground that four of defendant's witnesses had been quarantined on account of smallpox, *held* not an abuse of discretion or reversible error, where the record failed to show misconduct on the part of any juror or prejudice to defendant."

The record fails to show prejudice in this aspect of the case, and that portion of it which we have quoted shows no attempt on behalf of defendant to ascertain whether any juror had been contaminated during the recess. To reverse the judgment of a trial court on such a point would be destructive of the exercise of that independent discretion of the trial judges which seems to have been used with fairness in this instance.

The information contained two counts. The first charged murder in the first degree while attempting to perpetrate a burglary and the second charged conventional murder in the first degree. Error is asserted because the court refused to require the state to elect to proceed on one or the other count, and because in the first instruction given to the jury he submitted both counts to the jury. The overt acts necessary to prove ordinary murder and to prove the felony while attempting to commit burglary were the same up to the point of the said intent. Where different criminal acts constitute parts of the same transaction, they may be joined in the same indictment or count thereof. *Aiken v. State,* 41 Neb. 263; *Blodgett v. State,* 50 Neb. 121; *Zediker v. State,* 114 Neb. 292.

The defendant has set out a large number of assignments of error. We have treated those which seem to merit discussion. We have examined the others and do not deem them of sufficient importance to the parties involved nor to the profession to warrant so prolonged an opinion as would be required in their discussion. We do not find them meritorious.

On the whole we are of the opinion that the defendant had a fair trial and that the record is without prejudicial error. The judgment of the district court is right and is

AFFIRMED.

Note—Homicide, 30 C. J. sec. 497 n. 20, sec. 500 n. 52, sec. 504 n. 42, sec. 507 n. 78, 84—Dying Declarations, 25 L. R. A. 445; 52 L. R. A. n. s. 152; 56 L. R. A. 382; 1 R. C. L. 539; R. C. L. Perm. Supp. 150.

WILLIAM S. MCCULLEY, APPELLANT, V. ANDREW ANDERSON, APPELLEE.

FILED NOVEMBER 8, 1929. NO. 26791.

1. Highways: ARTERIAL HIGHWAYS: RIGHTS OF MOTORISTS. A motorist on a nonfavored street, having stopped as required by ordinance, and having looked to the right and left before entering an arterial highway and found the intersection clear of traffic, has a right, in proceeding to cross it, to assume that motorists on the arterial highway will likewise obey traffic regulations, exercise due care and, if necessary to prevent a collision, slacken their speed.
2. Negligence: BURDEN OF PROOF. Where plaintiff in an action for negligence resulting in personal injuries makes a *prima facie* case without disclosing any negligence on his part, the burden is on defendant to prove that the proximate cause of the injuries was the negligence or contributory negligence of plaintiff, if that is the defense pleaded.
3. ———: CONTRIBUTORY NEGLIGENCE. Contributory negligence as a defense must be proximate to plaintiff's injury in the same sense in which defendant's negligence must have been proximate to the injury giving rise to the cause of action.
4. ———: ———: INSTRUCTIONS. Where plaintiff has made a *prima facie* case in an action for negligence resulting in personal injuries without disclosing any negligence on his part, the failure to instruct the jury that contributory negligence as a defense must have been the proximate contributing cause of the injuries may be prejudicially erroneous even in absence of a request for such an instruction.
5. Highways: ARTERIAL HIGHWAYS: RIGHTS OF MOTORISTS. With the exception of a required stop at an arterial highway, the principles of law applicable to traffic thereon as to right of way

privileges are the same as upon nonfavored streets, modified, however, by the conditions arising out of the stop requirement.

6. ———: ———: ———. The right of a motorist on an arterial highway to assume that a motor-cycle on a nonfavored intersecting street will be brought to a stop before entering the intersection does not permit him to exceed the speed limit or to disregard other traffic regulations or to claim the right of way when too far from the intersection to be entitled thereto.

7. ———: ———: ———. An ordinance designating a street as an arterial highway and requiring motorists to stop before entering it from intersecting thoroughfares does not grant an exclusive privilege to drivers on the favored artery or require those crossing it to do so at their peril regardless of the duty of motorists on all highways to obey traffic regulations and to exercise due care to protect the rights and property of others.

8. **Negligence:** ARTERIAL HIGHWAYS. Where a motorist on a nonfavored street stops at an intersecting arterial highway when the intersection is clear of traffic, looks to the right and left for approaching vehicles, acting as a reasonably prudent person in the exercise of due care would act in the belief that he has time and opportunity to safely cross, he is not liable for negligence merely because he attempts to do so.

9. ———: ———: COLLISION: INSTRUCTION. In the trial of a cause of action arising from a collision of motor vehicles at the intersection of an arterial highway and a nonfavored street, where the issues of negligence and contributory negligence are involved, the jury should not be allowed to put their own interpretation on the ordinance designating the arterial highway and requiring motorists to stop before entering it, but should be instructed as to the relative or reciprocal rights and duties of motorists in entering and using the intersection.

10. **Trial:** IMPROPER COMMENTS BY COURT. In the trial of a cause before a jury, improper comments of the trial judge from the bench may be prejudicially erroneous where they tend to discredit a witness and his testimony.

11. **Evidence:** INTOXICATION: NONEXPERT WITNESSES. Testimony tending to prove that a defendant was under the influence of liquor while operating an automobile in a public street may be given by a nonexpert witness.

APPEAL from the district court for Douglas county: JAMES M. FITZGERALD, JUDGE. *Reversed.*

Shotwell & Ready, for appellant.

Wear, Moriarty, Garrotto & Boland, contra.

Heard before GOSS, C. J., ROSE, DEAN, GOOD, THOMPSON, EBERLY and DAY, JJ., and REDICK, District Judge.

ROSE, J.

This is an action to recover $40,000 in damages for personal injuries alleged to have been negligently inflicted by defendant while driving his automobile at an unlawful rate of speed into plaintiff's motor-cycle at the intersection of Forty-second and Leavenworth streets in Omaha—paved highways that cross each other at right angles. Leavenworth street between curbs is 40 feet wide and runs east and west. The width of Forty-second street between curbs is 25 feet and it runs north and south. Lengthwise on Leavenworth street there is a street car track on each side of the center. That street is a public thoroughfare designated by city ordinance as an "arterial highway" and drivers entering it from nonfavored cross streets are required, before doing so, to stop near the intersection at places indicated by stop signs.

The petition contains pleas that plaintiff, on a motor-cycle, approached Leavenworth street from the north on Forty-second street, came to a stop before entering it, observed it was free from traffic and carefully proceeded south on the right side of Forty-second street until his motor-cycle passed over the first street car track beyond the center of the intersection, when defendant, driving an automobile westward on the wrong side of Leavenworth street at an unlawful and dangerous speed collided with plaintiff, thus permanently injuring him and demolishing his motor-cycle.

In the answer to the petition defendant alleged the collision was not due to any negligence on his part. The answer also contained the defense that plaintiff's injuries and damages, if any, were "due entirely to his own gross negligence, carelessness and recklessness which caused and directly contributed" to the accident.

The reply contained a denial of unadmitted facts pleaded in the answer.

From judgment on a verdict in favor of defendant, plaintiff has appealed.

The failure of the trial court to instruct the jury that negligence of plaintiff, if any, would not prevent a verdict in his favor unless it contributed to or caused the collision is assigned as error and presented on appeal as a ground for reversal. The principle of law invoked was stated in a former opinion as follows:

"The plaintiff's negligence will not defeat a recovery unless it was the sole cause of the plaintiff's injury, or concurred or co-operated with the defendant's negligence as a proximate cause of the accident." *McGahey v. Citizens R. Co.*, 88 Neb. 218.

The trial court did not give an instruction on this feature of the case. Was the omission erroneous? The solution of the question requires an examination of the evidence. Eye-witnesses called by plaintiff testified positively that he stopped on Forty-second street at the place indicated by the stop sign and started directly south across the west side of the intersection when clear of traffic and when defendant was east of it on Leavenworth street; that plaintiff, after stopping, was first to enter the intersection, but did not proceed faster than five miles an hour; that he went south on the west side of Forty-second street; that defendant was east of Forty-second street when plaintiff entered the intersection. One witness testified in substance that she was driving west on Leavenworth street at the rate of 25 miles an hour; that defendant drove up behind her when she was nearing the intersection at Forty-second street, turned south to pass her, touched the fender of her automobile while going 35 or 40 miles an hour, went south of the center of Leavenworth street, turned north in front of her, zigzagged and ran into plaintiff's motor-cycle west of the intersection near the center of it; that she stopped her car and accosted defendant where his car stopped perhaps 60 feet from the point of impact, noticed the odor

of liquor on his breath, and told him the accident would not have happened if he had not been drinking. She said he admitted going too fast and she expressed the opinion that he was under the influence of liquor. The estimates of all eye-witnesses except defendant himself indicate that he exceeded a speed of 20 miles an hour in the intersection and some were of the opinion that his speed was as high as 35 or 40 miles an hour. There is evidence tending to show that defendant violated an ordinance forbidding him from driving an automobile while under the influence of liquor; an ordinance limiting speed to 20 miles an hour in the intersection; an ordinance against driving on the wrong side of the street; a law requiring the driver of a motor vehicle in a public street to exercise reasonable care to protect the rights of others in the lawful use of the same street. The evidence is clear that defendant's automobile, after the impact, ran toward the southwest, struck the curb on the south side of Leavenworth street west of Forty-second street, smashed a wheel when it struck the curb and stopped at a brick pillar approximately 60 feet from the point of collision. The violence of the impact and the distance the automobile traveled before coming to rest at the pillar tend to prove excessive speed. Plaintiff was thrown a considerable distance and fell on the pavement southwest of the center of the intersection. The circumstances generally tend to strengthen the testimony of plaintiff's eye-witnesses and to prove that the automobile struck the motor-cycle. It may fairly be inferred from the evidence adduced by plaintiff that the accident would not have happened if defendant had slackened his speed or had kept a direct course west on the north side of Leavenworth street instead of zigzagging across the intersection. Plaintiff made a *prima facie* case without disclosing any negligence on his part.

If plaintiff, after stopping as required by ordinance, entered the intersection and proceeded lawfully when it was clear of traffic, he had a legal right to assume that defendant, while approaching from the east, would likewise take

the precautions required by ordinance for the protection of others. Without warning or knowledge plaintiff was not bound to anticipate negligence on the part of defendant. 45 C. J. 954, sec. 512.

On the issue that plaintiff's injuries and damages, if any, were "due entirely to his own gross negligence, carelessness and recklessness which caused and directly contributed" to the accident, the burden of proof was on defendant. The law on this point, in connection with the *prima facie* case made by plaintiff, has been stated in the following language:

"If the defendant pleads that the plaintiff was guilty of contributory negligence, or that the accident resulted solely from his negligence, the burden is upon the defendant to prove those defenses, and does not shift during the trial of the case." *McGahey v. Citizens R. Co.*, 88 Neb. 218. To the same effect: *New Omaha Thompson-Houston Electric Light Co. v. Dent*, 68 Neb. 668; *Western R. Co. v. Williamson*, 114 Ala. 131; *Gordon v. City of Richmond*, 83 Va. 436; *Interstate R. Co. v. Tyree*, 110 Va. 38; *Punkowski v. New Castle Leather Co.*, 4 Penn. (Del.) 544; *Mac Feat v. Philadelphia, W. & B. R. Co.*, 5 Penn. (Del.) 52; *Texas & P. R. Co. v. Mayfield*, 23 Tex. Civ. App. 415; *Schmidt v. St. Louis R. Co.*, 149 Mo. 269.

Defendant assumed the burden of proving contributory negligence and testified in his own behalf, stating in substance that his rate of speed was 18 or 20 miles an hour; that he was first to enter the intersection; that plaintiff did not stop at the stop sign but shot out in front of defendant; that defendant's automobile did not run into the motor-cycle; that the motor-cycle ran into the automobile; that defendant turned toward the center of the street to avoid a collision. This version of the accident stands alone and is at variance with the testimony of five eye-witnesses.

Plaintiff did not request an instruction that his negligence, if any, would not defeat a recovery unless it contributed to or caused the collision but, in view of the *prima facie* case made by him, it was the duty of the trial court

to so instruct without such a request. *Clark v. Monroe County Fair Ass'n,* 203 Ia. 1107. Defendant was not entitled to a verdict unless negligence of plaintiff contributed to or caused his injuries. In a recent law text it was said:

"In order to be contributory negligence, such negligence must be a proximate cause of the injury. It must be proximate to the injury in the same sense in which defendant's negligent act or omission must have been proximate to the injury in order to give a right of action." 45 C. J. 972, sec. 528.

The failure to instruct the jury that contributory negligence as a defense must have contributed to or caused the injury was an error prejudicial to plaintiff.

There was also a failure to instruct the jury as to the relative or reciprocal rights and duties of plaintiff and defendant at the intersection of the arterial highway and the nonfavored street. Such rights and duties affect the question of proximate cause and the law applicable thereto should have been stated to the jury. Plaintiff entered the intersection on a nonfavored street on which the drivers of motor vehicles thereon had the same rights and duties. Defendant entered the same intersection on an arterial or favored highway created by ordinance. Defendant offered and the trial court admitted the ordinance in evidence. It provides that all vehicles approaching such arteries "shall come to a stop before entering the same." The abuse of the privilege extended to drivers on arterial highways and favored streets has resulted in an alarming harvest of injuries and death as shown by the reports of adjudicated cases. The rule in Louisiana has been stated in this form:

"The right of way established by municipal ordinance in favor of vehicles using certain streets is not an exclusive privilege, and it must be exercised with due regard to the right of other vehicles to use the intersecting streets." *Vance v. Poree,* 5 La. App. 109.

The supreme court of Alabama ruled:

"A city ordinance providing that vehicles going in cer-

tain directions should have the right of way over vehicles going in other directions does not mean that a vehicle not having the right of way at a crossing must at its peril avoid collision with a vehicle having a right of way, irrespective of care or negligence by either party." *Ray v. Brannan,* 196 Ala. 113.

The federal court for the sixth circuit ruled as follows:

"Provision of a city ordinance that vehicles on main thoroughfares going in a general east and west direction shall have the right of way, as applied to automobiles, means only that, when two cars are approaching a street intersection, one on the main thoroughfare and the other on a crossing street, the latter shall give way to the other; but if there is no car on the main thoroughfare when one approaches it on an intersecting street, sufficiently near to demand this right of way, such provision has no application. It does not authorize reckless or careless driving on the main thoroughfares, without regard to the safety of crossing cars, and the driver of a car on an intersecting street has a right to assume that cars on the main thoroughfare will be operated in a lawful manner, at lawful speed, and with due care." *Bramley v. Dilworth,* 274 Fed. 267.

In Michigan the law is the same:

"If the circumstances are such as to induce in the mind of a driver of an automobile approaching a state trunk line highway intersection, acting as a reasonably prudent man, the belief that he had time and opportunity to cross before a vehicle approaching on said trunk line would reach the intersection, he cannot be said to be negligent because he makes the attempt to cross." *Pline v. Parsons,* 231 Mich. 466.

In Kentucky there is a similar rule or law:

"Driver of automobile traveling on servient highway need not yield to traveler on dominant highway except when two vehicles arrive at intersection at same time, even though lack of yielding may serve in some measure to interfere with the passage of a machine traveling on the dom-

inant highway." *Bradley v. Schmidt,* 223 Ky. 784.

With the exception of a required stop at an arterial highway, the principles of law applicable thereto as to right of way privileges are the same as those which apply to other streets.

"Right of one driving automobile on arterial street to assume that motor-cycle would be brought to stop before entering it did not give him right to travel in excess of established speed limits and without regard to rights of persons first reaching intersection to enter or cross such street." *Thompson v. Fitzgerald,* (205 Cal. 563) 271 Pac. 1072.

On authority and reason an ordinance designating a street as an arterial highway and requiring drivers of motor vehicles to stop before entering it from intersecting thoroughfares does not grant an exclusive privilege to drivers on the favored artery or require those crossing it to do so at their peril regardless of the duty of motorists on all public highways to obey traffic regulations and exercise due care to protect the rights of others. Where a motorist on a nonfavored street stops at an intersecting arterial highway when the intersection is clear of traffic, looks to the right and left for approaching vehicles, acting as a reasonably prudent person in the exercise of due care would act in the belief that he has time and opportunity to safely cross, he is not liable for negligence merely because he attempts to do so.

On the issues of proximate cause, an inherent element in both the cause of action and the defense, the jury should not have been allowed to put their own interpretation on the ordinance designating Leavenworth street as an arterial highway and requiring motorists to stop before crossing it from intersecting streets.

Other assignments of error challenge the conduct of the trial judge in making comments from the bench in the presence of the jury. The comments relate to witnesses and testimony. It is argued by plaintiff that witnesses called by him and testimony in his behalf were thus dis-

credited. The witness Francis Baust, 15 years of age, testified that he saw the accident from the northwest corner of the intersection. After describing at considerable length how the accident occurred, as he saw it, and the facts relating thereto, he said in substance that he was within two feet of defendant in front of him before either left the scene of the collision and that "his face was red and his eyes were drooping." Answering the question, "And did you observe the odor of liquor upon his breath?" the witness said, without objection, "Yes, sir." On cross-examination he was asked: "Where did you smell this liquor that you were talking about?" The answer was: "Well, from his breath." The witness was then asked: "I mean where else, where had you ever smelled any liquor before?" After an objection by plaintiff the court said to counsel for defendant:

"Why did not you object to it at the time that it was admitted? The court would not have allowed this boy to testify on that subject if there had been any objection made."

There was nothing in the testimony of the witness or in the record to disqualify him as such. Testimony tending to prove that a person is under the influence of liquor may come from a nonexpert witness. The credibility of a witness and the weight of his testimony are questions for the jury and not for the court. The remarks quoted were erroneous and the record contains other errors of a similar nature. *In re Estate of Strelow,* 117 Neb. 168.

For the reasons given, the judgment of the district court is reversed and the cause remanded for a new trial according to law.

REVERSED.

Note—Motor Vehicles, 42 C. J. sec. 701 n. 59, sec. 705 n. 33, 40, 47, sec. 707 n. 84, sec. 1136 n. 63—Negligence, 45 C. J. sec. 528 n. 91, sec. 755 n. 57, sec. 932 n. 16.

HENRY A. DAWSON, APPELLEE, V. STOCKMEN'S NATIONAL BANK OF RUSHVILLE, APPELLANT.

FILED NOVEMBER 8, 1929. No. 27108.

Appeal: BILL OF EXCEPTIONS. A bill of exceptions showing on its face that material evidence has been omitted will not be considered on appeal in determining issues of fact or the sufficiency of the evidence to sustain a finding below, though certified by the trial judge as a bill of exceptions containing all the evidence.

APPEAL from the district court for Sheridan county: EARL L. MEYER, JUDGE. Motion to quash bill of exceptions. *Motion sustained.*

Irving R. Butler and *C. C. Flansburg*, for appellant.

Allen G. Fisher and *Charles A. Fisher, contra.*

Heard before GOSS, C. J., ROSE, DEAN, GOOD, THOMPSON, EBERLY and DAY, JJ.

ROSE, J.

This is a motion by appellee to quash the bill of exceptions on the ground that it does not contain all material evidence offered and admitted at the trial in the district court. In resisting the motion appellant contends that there is an authentic and conclusive certificate of the trial judge allowing the bill of exceptions and stating that it contains all the evidence.

The bill of exceptions shows on its face that it does not contain testimony admitted at a former trial and again offered in evidence and again admitted at the trial resulting in the judgment of which appellant now complains. In an early case the following rule was announced:

"Where from an inspection of a bill of exceptions it is apparent that material evidence has been omitted, the certificate that it contains all that was used on the trial will not be taken as conclusive on that point." *Missouri P. R. Co. v. Hays*, 15 Neb. 224.

In a later case the supreme court held:

"The certificate of the trial judge attached to a bill of

exceptions, reciting that 'the bill contains all the evidence offered or adduced by either party,' is unavailing, and will not control, where the bill on its face reveals the fact that important and material evidence has been omitted therefrom; and in such case the verdict will not be set aside as contrary to the evidence." *Nelson v. Jenkins*, 42 Neb. 133.

The rules stated have been consistently applied where the same questions were involved. *Oberfelder & Co. v. Kavanaugh*, 29 Neb. 427; *Schneider v. Tombling*, 34 Neb. 661; *Dawson v. Williams*, 37 Neb. 1; *Omaha Fire Ins. Co. v. Berg*, 44 Neb. 522; *Conger v. Dodd*, 45 Neb. 36; *Storz v. Finklestein*, 48 Neb. 27; *Greene v. Greene*, 49 Neb. 546; *Alling v. Fisher*, 55 Neb. 239; *Girard Trust Co. v. Paddock*, 88 Neb. 359; *Card v. Mix*, 88 Neb. 741.

It follows that in determining issues of fact or the sufficiency of the evidence to sustain a finding below the bill of exceptions cannot be considered on appeal. For those purposes, therefore, the motion to quash is sustained.

MOTION SUSTAINED.

FRED ROEDER V. STATE OF NEBRASKA.

FILED NOVEMBER 14, 1929. No. 26939.

1. **Evidence** examined and outlined in the opinion *held* sufficient to sustain the verdict.
2. **Criminal Law**: INSTRUCTIONS. Error cannot be predicated on refusal to give instructions to the jury, where those given contain the substance of the ones requested.
3. ———: ———: MOTIVE. In a criminal prosecution, where there is evidence tending to prove a motive, the court is justified in refusing to give an instruction that lack of motive is a circumstance, in favor of defendant, to be considered by the jury.
4. **Evidence.** When one part of a conversation is given in evidence by one party, the whole on the same subject may be inquired into by the other. Comp. St. 1922, sec. 8849.

ERROR to the district court for Adams county: J. W. JAMES, JUDGE. *Affirmed.*

James E. Addie, for plaintiff in error.

C. A. Sorensen, Attorney General, and *Clifford L. Rein, contra.*

Heard before GOSS, C. J., ROSE, DEAN, GOOD, THOMPSON, and EBERLY, JJ., and REDICK, District Judge.

GOOD, J.

Plaintiff in error (hereinafter referred to as defendant) was convicted on an information charging him with malicious destruction of personal property of the value of more than $35, and was sentenced to imprisonment in the penitentiary for a period of 18 months. He prosecutes error to review the record of his conviction.

Several of the assigned errors relate to the sufficiency of the evidence to sustain the verdict. From the record the following pertinent facts appear:

The defendant and one Albright each owned and operated threshing machines and were competitors in business. Defendant lived in the city of Hastings. On October 24, 1928, after completing a job of threshing, Albright's machine was moved to the premises of one Hollister and was set in a stubble field, preparatory to engaging in another job of threshing on the following day. After the machine was so placed, Albright cleaned the separator before leaving it for the evening. That night, shortly after 12 o'clock, the separator was discovered to be on fire. It was wholly consumed by the flames. There had been no electrical storm that day or evening, and it was apparent that someone must have set fire to the separator. An examination of the premises about the machine the following morning disclosed foot-prints leading to and from the scene of the fire. These tracks were traced and they came from and returned to a nearby corn-field into which an automobile had been driven and turned around. These foot-prints were carefully examined and disclosed certain peculiarities. The tracks made by the tires of the automobile were also examined, from which it was discovered that a different character of tire was upon each one of the wheels; one being a smooth tire; another with a patch upon it which made a

mark at each revolution of the wheel, and the others bearing peculiar marks showing a different kind of tire upon each of the wheels.

For some years previous defendant had done the threshing for Mr. Hollister and others in the neighborhood, and had solicited their threshing jobs for the season of 1928, but had been informed that the jobs had been given to Albright. Suspicion was directed to the defendant, and on the morning of August 25 a deputy sheriff went to defendant's home and found him working upon his threshing machine. The deputy informed him that he was suspected or accused of burning Albright's separator, and requested defendant to go with him to the courthouse, to submit to an examination by the county attorney. Defendant consented and went with the deputy sheriff to the county attorney's office. The county attorney being at the time engaged in his private room, defendant was seated in the outer office, where the deputy left him while he went into the sheriff's office. In a few moments it was discovered that the defendant had left the courthouse, without waiting to be questioned by the county attorney. Search was made for him and he was not found in his room or about the city of Hastings.

It appears that defendant left the city that day, about noon, and drove to the home of one Carl Brucker, some seven or eight miles in the country. He tried to induce Brucker to go with him to North Dakota, to there engage in threshing. Brucker's working engagements would not permit him to go at that time. That night Brucker and his mother drove into the city of Hastings. Defendant accompanied them in their car, stating to Brucker that he did not want to bring his own car into Hastings. While in Hastings that evening he obtained his clothing and returned with Brucker and his mother to their home. The next morning he told Brucker that he was going to North Dakota and gave him an address, with the request that Brucker write him and send any clippings, relative to the fire, which might appear in the newspapers. He also

told Brucker that the officers were after him but that they would not "get him" in Nebraska.

The premises of defendant were searched and under his bed were found a pair of shoes. These were taken and fitted into the tracks found in the corn-field and leading to and from the location of the burned separator. The shoes not only fitted the tracks made, but certain peculiarities of the heels and sides of the shoes were observed in the tracks, which were such as these particular shoes would make. Also, one witness, who had worked for the defendant, testified that he had seen him wear shoes of this particular type. A pair of defendant's shoes were placed in evidence, and, although evidently of a different type, the shoes are the same size as those found under his bed. Later the defendant was arrested in North Dakota, and he and his automobile were brought back to Hastings. The tires, taken from his car, were introduced in evidence. It appears that one of the tires has a smooth tread, another a large patch upon it, which corresponds to the mark of the car track found in the field. Each of the other tires is of a distinctive and different type, and the markings of these tires also correspond very closely to the several markings of the tire tracks in the field.

While returning from North Dakota defendant denied burning the separator, but told the deputy sheriff that he would like to have Mr. Albright come to the jail to see him, and indicated a willingness to pay him for the loss of his machine. It also appears that one witness, who had formerly worked for defendant, and who was seeking employment for the season of 1928, was told by defendant that Albright had secured a number of the threshing jobs which defendant formerly had, and that he believed Albright was cutting prices, and defendant stated that he would "get even" with him. There were other circumstances proved pointing toward defendant's guilt.

While the evidence of defendant's guilt is circumstantial, from a consideration of the entire record we are

constrained to hold that the jury, if they believed the state's witnesses, were warranted in the verdict which they returned. It is true that defendant and his brother testified that on the night in question defendant was at his home; that they slept in the same bed; and that defendant had nothing to do with the burning of the separator; and it is also true that a large number of reputable citizens testified to defendant's previous good character as a law-abiding citizen; but this presented merely a question for the jury. It was for them to determine whom they would believe.

Complaint is made of nearly all of the instructions given by the court, but only one or two are discussed in the briefs. After a careful examination of the entire charge, we find no misstatement of the law, or anything that was prejudicial to the rights of defendant.

We have carefully examined all of the requested instructions, and find that most of them are covered in those given by the court.

Particular complaint is made of the failure of the court to instruct the jury that lack of motive was a circumstance to be considered in defendant's favor, in determining his guilt or innocence. We think there was sufficient evidence to indicate that there was a motive, and the court was, therefore, justified in refusing to give an instruction of the character requested.

Complaint is made because the county attorney was permitted to ask leading questions of several of the witnesses. In a number of instances leading questions, suggesting the answers, were propounded and answered, but in nearly every instance no objection to the question was interposed. In one or two instances there was an objection lodged. The rule is that it is within the sound discretion of the trial court to determine whether leading questions shall be permitted, and error cannot be predicated upon the ruling of the court in permitting leading questions, unless there is an abuse of discretion. The answers to the questions, to which objection was interposed and over-

ruled, were not prejudicial to the defendant, and we do not find that there was any abuse of the court's discretion.

Serious complaint is made because the deputy sheriff was permitted, while on the witness-stand, to detail, on his redirect examination, a conversation had with one Dohman, in North Dakota, where defendant was arrested, and which conversation was not had in the presence of defendant. This testimony was quite damaging to the defendant. The record discloses that counsel for defendant first went into the conversation had with Dohman and brought out a part of it, and, upon redirect examination, the trial court permitted the whole of the conversation to be detailed.

Section 8849, Comp St. 1922, *inter alia,* provides: "When part of an act, declaration, conversation or writing is given in evidence by one party, the whole on the same subject may be inquired into by the other." Since the defendant, himself, first introduced evidence of a part of the conversation in question, the court properly ruled that the state was entitled to give the whole of the conversation on the same subject-matter.

The record discloses no error prejudicial to the rights of the defendant. The judgment is

AFFIRMED.

TRAVELERS INSURANCE COMPANY ET AL., APPELLEES, V. HARRY C. OHLER, APPELLANT.

FILED NOVEMBER 14, 1929. No. 27177.

1. **Master and Servant:** COMPENSATION CASES: APPEAL. The rule established in compensation cases, that the finding of the trial court, based on conflicting evidence, will not, on appeal, be disturbed if supported by sufficient competent evidence, is applicable to compensation cases where the judgment of the district court was rendered before the taking effect of chapter 81, Laws 1929.
2. **Constitutional Law:** STATUTES: WHEN MAY NOT OPERATE RETROACTIVELY. A legislative act will not be permitted, even if an attempt so to do is disclosed, to operate retrospectively where it

will have the effect to invalidate or impair the obligation of contracts or interfere with vested rights.

3. **Master and Servant: INJURY TO SERVANT: SUFFICIENCY OF EVIDENCE.** The record examined, and *held* that the finding of the trial court as to the cause of appellant's disability is not sustained by sufficient competent evidence.

4. ———: ———: **NOTICE.** An employee, sustaining an accidental injury arising out of and in the course of his employment, will not be denied compensation for failure to give notice of claim within six months or to commence his action within one year from the date of the accident, when it appears from the evidence that the injury was latent and did not result in compensable disability until after the expiration of the time for giving notice of claim and commencing action, provided notice is given and action commenced within the statutory period after the employee has knowledge that the accident has caused a compensable disability.

APPEAL from the district court for Lancaster county: ELWOOD B. CHAPPEL, JUDGE. *Reversed, with directions.*

Kinsinger & Ogden, for appellant.

Hall, Cline & Williams, contra.

Heard before GOSS, C. J., ROSE, DEAN, GOOD, THOMPSON, EBERLY and DAY, JJ., and REDICK, District Judge.

GOOD, J.

This action arises under the workmen's compensation law. Appellant Ohler was an employee of the Patriot Manufacturing Company. The Travelers Insurance Company was the compensation insurance carrier for the employer.

To defeat the claim for compensation it was alleged in the district court: (1) That the disabilities of appellant were not caused nor contributed to by the accident; (2) that no notice of claim for compensation was given within six months from the date of injury; and (3) that no action was commenced by filing a claim before the compensation commissioner until more than a year had elapsed from the date of the accident. The district court sustained the contentions of appellees and denied compensation. Ohler has appealed.

On October 3, 1926, while appellant was in the performance of his duties as an employee of the Patriot Manufacturing Company, he received an electric shock. He received treatment on two occasions shortly thereafter from his employer's physician, the bill for which was paid by the employer or the insurance company. Apparently, appellant did not consider the injury very serious at the time, but continued his work, with slight interruptions, until October 29, 1927, when he voluntarily quit work because of his alleged incapacity to perform his duties.

Very shortly after the accident appellant suffered a loss of appetite, loss in weight, and severe and continuous headaches; later suffered from sleeplessness; was nervous and incapable of concentrating his mind upon his work or upon any given subject; lost interest in his work; became irritable, at times dizzy, and it was this condition which caused him to cease work on the 29th of October, 1927. It is his contention that this condition was the direct result of the electric shock.

The evidence, as to whether his condition was caused by the electric shock or from some other unknown cause, is in direct conflict. A number of eminent physicians, skilled in nervous and mental disorders, were called to testify for each of the parties. Those called by appellant included physicians who had treated him from time to time from the date of the accident up to the trial, a period of more than two and one-half years; while the two physicians called by the appellees had never treated him, and their opinions were based upon an examination made only a few days before the trial of the cause in June, 1929. One of these two physicians unqualifiedly stated that the injury or the accident was not the cause of his present disability. This physician, as a witness, however, evinced a very strong partisanship, and was evasive in his cross-examination to such an extent that the weight of his testimony is very greatly affected. The other of the two physicians called by appellees expressed the opinion that appellant was suffering from a nervous breakdown, and

that the cause of it was overwork, but on cross-examination admitted that the electric shock had aggravated and accelerated the nervous breakdown; while the testimony of the several doctors, four or five in number, who had treated and examined appellant and had a more intimate knowledge of his condition over a greatly extended period of observation gave it as their unqualified opinion that his present disability was the direct result of the electric shock. It is true that the physicians testifying for appellant do not agree as to the exact nature or name of his injury. Some diagnose it as cerebral edema and others as multiple sclerosis, but, in any event, all of them agree that he is, practically, totally disabled from performing his accustomed duties, and that his condition was caused by the electric shock.

The rule has obtained in this jurisdiction that the findings of the trial court will not be disturbed in compensation cases if supported by competent evidence. *City of Fremont v. Lea,* 115 Neb. 565; *Bauer v. Anderson,* 114 Neb. 326; *Young v. Johnson & Blind,* 113 Neb. 149. Counsel for appellant, however, call attention to section 3060, Comp. St. 1922, as amended by chapter 81, Laws 1929, which, in part, provides: "If either party at interest is dissatisfied with the award of the compensation commissioner, then the matter may be submitted to the district court, * * * which court shall have authority to hear and determine the cause as in equity when the same for all purposes shall be tried as one in equity, and if an appeal is had to the supreme court, the same shall be considered *de novo.*" Counsel contend that this statute is applicable to the case here.

The record discloses that the judgment in this case was rendered on the 11th of July, 1929, while chapter 81, Laws 1929, did not become a law until the 24th day of July, 1929. It is a general rule that statutes will act prospectively and not retrospectively unless a contrary intention is clearly disclosed. *State v. Federated Merchants Mutual Ins. Co.,* 117 Neb. 98, and cases there cited. It may be observed

that there is nothing in said chapter 81 indicating an intent that it should operate other than prospectively. Counsel for appellant, however, seem to contend that, if the appeal is taken subsequent to the time when the act becomes a law, it is applicable thereto. We do not think that this contention can be sustained, as applied to the instant case and under the particular statute, for the following reasons:

A legislative act will not be permitted, even if an attempt so to do is disclosed, to operate retrospectively where it will have the effect to invalidate or impair the obligation of contracts or interfere with vested rights. 2 Lewis' Sutherland, Statutory Construction (2d ed.) sec. 642; *United States v. Jackson,* 143 Fed. 783; *Hoyt Metal Co. v. Atwood,* 289 Fed. 453; *Spitzer v. Healy,* 218 N. Y. 737.

In *Davis v. Robinson,* 200 Ia. 840, it was said: "The courts of this country with practical unanimity have always held that the time allowed for an appeal cannot be reduced by legislative enactment after judgment." In *Wilcox v. Saunders,* 4 Neb. 569, 573, relating to the right of appeal by statute, it was said: "In the interpretation of statutes, it is a familiar doctrine that they can have no retrospective operation beyond the time of their commencement, unless so declared by express words or positive enactment, and in such case they will be considered as inoperative and void, if they affect or change vested rights." In 6 R. C. L. 319, sec. 307, it is said: "A judgment is such a vested right of property that the legislature cannot, by a retroactive law, either destroy or diminish its value in any respect." The rule above quoted was announced in *Hoyt Metal Co. v. Atwood, supra,* and numerous cases are therein cited as holding to the same effect.

It may be conceded that, ordinarily, the rules of court procedure alone may at any time be changed by legislative enactment, but if a legislative enactment does, in fact, impair or affect a vested right it is unenforceable or inapplicable as against the enforcement of rights so impaired. What belongs merely to the remedy may be altered,

provided that the alteration does not impair the obligation of the contract or interfere with the vested right. If it does the latter, then it is invalid and contrary to the Fourteenth Amendment of the federal Constitution. *Hoyt Metal Co. v. Atwood, supra; Tennessee v. Sneed,* 96 U S. 69, 24 L. Ed. 610; *McGahey v. Virginia,* 135 U. S. 662, 34 L. Ed. 304.

When the judgment was entered in the district court the parties had vested rights, and one of these rights was that this judgment could only be overturned, on appeal, on a question of fact by the rule then applicable thereto. We are constrained to hold that section 3060, Comp. St. 1922, as amended, does not require the trial of compensation cases in this court *de novo,* except in cases where the judgment was rendered after chapter 81, Laws 1929, became a law.

We are required, therefore, to determine whether the finding of the trial court is supported by sufficient competent testimony, or whether it is clearly wrong. There is no conflict in the record that appellant suffered an electric shock, nor of the fact that thereafter he became afflicted in the manner above indicated, and that he is now practically disabled from performing his ordinary duties. The only conflict is as to whether that condition is the result of the electric shock. Upon a consideration of the entire record, we think that the great weight of the testimony indicates very clearly that appellant's disability is a result of the electric shock which he received in October, 1926. Indeed, one of the experts called by appellees admitted that his condition was in part due to the electric shock. An examination of the entire record convinces us that the finding of the trial court is not sustained by sufficient evidence and is so contrary to the weight of evidence as to be clearly wrong.

Having determined that appellant has sustained a compensable injury, we are now required to determine whether he shall be deprived of compensation because of his failure to give notice of claim and commence his action within the time prescribed by statute.

This court has recognized that the workmen's compensation law was framed for the purpose of requiring industries to bear a part of the loss occasioned to workmen, engaged therein, becoming disabled while employed in the industry, when such disability arises out of and in the course of employment. It has been the declared policy of this court not to deny its benefit by resorting to strained or technical construction, but to give to its provisions a liberal construction so as to effectuate its general purpose. *Parson v. Murphy*, 101 Neb. 542; *Selders v. Cornhusker Oil Co.*, 111 Neb. 300. Applying these principles in the case last cited, this court held: "A latent accidental injury to a workman, seeming at first to be trifling, but subsequently resulting in disability, may be found to occur when discovered by means of X-rays, within the meaning of the workmen's compensation law, providing that no proceeding for compensation shall be maintained unless the claim therefor is made within six months from the occurrence of the injury." In that case the injury was latent, the claim was not filed within six months, and it was held that the injured employee was not thereby denied compensation.

Again, in *McGuire v. Phelan-Shirley Co.*, 111 Neb. 609, the same rule was applied, and it was therein determined that an injured workman, who had not given notice of his claim within six months and had not filed his claim within the one year prescribed by the statute, was not thereby deprived of the right to receive compensation. In *City of Hastings v. Saunders*, 114 Neb. 475, it was held: "Where an employee is accidentally injured, and such injury is latent and of a progressive nature, and subsequently culminates in a compensatory disability, a claim for such injury under our employers' liability act may be filed with the compensation commissioner at any time within one year after the culmination thereof."

The record in the present case discloses that the injury received by appellant was of a latent character and did not develop, so that he was aware of the fact that he had a compensable injury, until long after the time for filing

claim and commencing action, by the strict letter of the statute, had expired. We think the facts presented in this case bring it within the rule announced in the authorities just cited, and that the defense that notice of claim was not given, or the action commenced within the statutory period, is not available to the appellees in this case.

The record shows that at the time of his injury appellant was earning $75 a week. His earning at the present time and since the date is and has been negligible. Under the statute applicable, he is entitled to compensation at the rate of $15 a week for a period of 300 weeks, dating from the 29th day of October, 1927, and $12 a week for the remainder of his life, subject, however, to a modification in the event his disability ceases or is lessened so as to affect the amount of his recovery, as provided by statute.

Appellant is also, as disclosed by the record, entitled to recover for medical care and services the sum of $126, and to an allowance for attorney's fees in the sum of $200.

The judgment of the district court is reversed, and the cause remanded, with directions to enter judgment for appellant in conformity with this opinion.

REVERSED.

Workmen's Compensation Acts, C. J. sec. 103 n. 43; sec. 134 n. 82, sec. 139 n. 95, sec. 144 n. 29, L. R. A. 1917D, 138; L. R. A. 1918E, 559; 16 A. L. R. 462; 28 R. C. L. 825; 4 R. C. L. Supp. 1869; 5 R. C. L. Supp. 1579; 6 R. C. L. Supp. 1764; 7 R. C. L. Supp. 1010.

SIDNEY A. TROBOUGH V. STATE OF NEBRASKA.

FILED NOVEMBER 14, 1929. No. 26967.

1. Jury: CHALLENGE FOR CAUSE. In the impaneling of a jury in criminal cases, all challenges for cause shall be tried by the court, on the oath of the person challenged, or on other evidence, and, as of right, shall be made before the jury is sworn and not afterward.

2. ———: ———: TRIAL OF ISSUE. Likewise, after a party's peremptory challenges are exhausted, if a cause of challenge is then denied by a proposed juror on his *voir dire*, such party has the right to have, on his application, the issue tried by the court, for which purpose witnesses on either side may be summoned and examined as on the trial of other issues of fact.

ERROR to the district for Adams county: J. W. JAMES, JUDGE. *Reversed.*

F. L. Carrico, for plaintiff in error.

C. A. Sorensen, Attorney General, and *Homer L. Kyle, contra.*

Heard before GOSS, C. J., ROSE, DEAN, GOOD, THOMPSON, EBERLY and DAY, JJ., and REDICK, District Judge.

EBERLY, J.

In a prosecution by the state, in the district court for Adams county, Sidney A. Trobough was convicted of murder in the second degree, and, as a penalty therefor, was sentenced to serve a term of 18 years in the penitentiary. His wife, Sarina Trobough, was the victim of the homicide. As plaintiff in error, the defendant presents for review the record of his conviction.

The first error assigned is the refusal of the court to permit the introduction of evidence in contradiction of the statements of the *voir dire* of, and overruling defendant's challenge for cause to, juror James Knudson. It appears from the record that, after the regular panel had been exhausted, the court ordered the sheriff to summon twelve men from the body of the county; the sheriff proceeded to summon the twelve men, two of these being excused for cause; a further order was made by the court to call additional talesmen. Examination and challenge having exhausted the talesmen so ordered by the court, a further and additional order was made by the district court directing the sheriff to bring in two more men from the body of the county. At this time the defendant had exhausted the last of his peremptory challenges. The juror James Knudson, who had been summoned as a talesman, was

then called by the clerk and examined by the county attorney, and upon such examination by the county attorney he in substance testified that he did not know Sidney A. Trobough, nor any of the members of his family, and that he had heard nothing about the case, only what he had read in the paper; that he had never talked to any one about the case, save and except members of his family; that he did not think he had any opinion as to the guilt or innocence of the defendant. Thereupon the defendant's attorney propounded the following interrogatories, to which the following answers were returned: "Q. Were you at the Brandes Hall some time since the happening of this affair in which you expressed yourself about this matter? A. I might have been there. Q. Do you recall at any time at a dance at the Brandes Hall that you talked about this matter? A. Well, I don't seem to remember that I did, but it may be that I did. Q. And you don't remember at that time of expressing an opinion about the guilt or the innocence of this defendant? A. No. Q. You have talked, though, to other persons outside of the members of your family about it haven't you? A. Well, I may possibly have, I don't recollect of it, though. Q. You don't recollect, of talking to anybody else, only the members of your family? A. I don't seem to. Q. Now, calling your attention to the time that you had this talk in the Brandes Hall, it was right after this trouble happened out here; do you recall now of talking to Mr. Kockrow up there about this matter and expressing yourself about it? A. I remember—I believe that was a night or so afterwards. Q. And you did express yourself at that time, didn't you? A. I don't remember that I did. Q. You had rather a heated argument, didn't you? A. No; I don't think that. I remember we talked about it now with Mr. Kockrow and somebody else. Q. And you at that time expressed your opinion about it, didn't you? A. I can't seem to think that I did. I don't remember it. Mr. Carrico: Well, that is true. I can't go any further. I want to challenge him for cause, and will introduce further evidence to show that he did talk and express his opinion. The Court: You can ask the

juror anything you want to. Mr. Carrico: I have asked all that I can ask him. I challenge the juror on that ground, and offer to introduce other evidence to show that he did form and express an opinion. Mr. Crow: We resist the challenge. The Court: Q. Have you any opinion at this time as to the guilt or innocence of the defendant? A. No. Q. Have you ever had? A. No; not that I know of. I don't think I do. Q. You feel at this time that you can enter upon the trial of this case and render a verdict as between the state and the defendant upon the evidence as given by the sworn testimony of the witnesses and the law as given you by the court, and lay everything else aside except that? A. Yes. Q. You think you can? A. I believe I could."

And thereafter the defendant, prior to the commencement of the trial and introduction of evidence, further objected to the juror James Knudson as follows:

"Mr. Carrico: Now the defendant further objects to James Knudson for the reason that said James Knudson has formed and expressed an opinion, and denied the same on his examination; and, further, that at the time the said James Knudson was called to qualify as a juror the defendant had already exhausted all of his peremptory challenges and that he had no opportunity then save and except the opportunity of showing by extrinsic evidence or other witnesses that the said James Knudson had so formed and expressed such opinion.

"This defendant offers to show that the said James Knudson not only expressed an opinion, but declared the defendant to be guilty, and that he would like to have an opportunity to so declare; that he expressed some desires of wanting to be on the jury for that purpose. And defendant offers to show all the said facts from other witnesses who were present at the time and heard the said James Knudson make said declarations."

These objections were carried over in the motion for new trial, and the four affidavits in support thereof are to the effect that on the night of the 29th of November, 1928, the juror James Knudson was in attendance at a

dance at Brandes Hall in the city of Hastings, Nebraska; that James Knudson was then talking to other persons about the case of State of Nebraska v. Sidney A. Trobough, and that at said time the said Knudson stated that defendant Trobough was no doubt guilty; that there was not any doubt about his guilt; that the electric chair was too good for him, and that, if he was on the jury, he would send him there; that he voiced his sentiment as to guilt of defendant in very strong, loud and vehement terms, and that at said time said Knudson was talking in the presence of and with persons who were and appeared as witnesses in the case of State v. Trobough.

The court ignored the issue of fact thus tendered by the defendant; denied him permission to introduce extrinsic evidence to establish the true facts and the true attitude of mind of the juror James Knudson, and overruled all challenges to the competency of that juror, who thereafter participated in the trial as a member of the jury.

One of the rights secured by our Constitution to the accused is that of a speedy public trial by a fair and impartial jury of the county or district in which the offense is alleged to have been committed. Has such a trial been accorded the accused in the present case?

The enforcement of this right is committed, in the first instance, to the trial court. As a device provided to secure this end, we have our system of examination and impaneling of the jury. Ordinarily, incompetency of jurors is disclosed by their *voir dire* examination, but this is not necessarily always true. A cause for challenge or the matters of fact constituting the grounds sustaining such challenge may be denied by the proposed juror when in truth they exist. Such a situation calls for the application of the rule that—"If the cause of challenge is denied, a party has the right to have the issue tried and witnesses on either side may be summoned and examined as on the trial of other issues." 35 C. J. 401. "The tendency of the modern practice, however, to submit the whole question of the qualifications or compentency of the proposed jurors to the court * * * so that, while the juror may himself be

sworn as a witness to prove the cause of challenge, and may be asked any questions not tending to degrade or incriminate him, the cause of challenge may be established by any other competent testimony, * * * and the parties have a right to contradict the testimony of the juror by that of other witnesses. On a challenge to the favor any fact or circumstance from which bias or prejudice may justly be inferred is admissible as evidence. The matter is regulated by statute in some states." 35 C. J. 400.

Section 10135, Comp. St. 1922, provides as follows: "All challenges for cause shall be tried by the court, on the oath of the person challenged, or on other evidence, and such challenge shall be made before the jury is sworn, and not afterward." In view of the terms of the above pronouncement it would seem the right to introduce extrinsic evidence to show the actual attitude of mind of a person tendered as a juror should be granted. The statute quoted is in fact a legislative recognition of the rule announced in 35 C. J. 400, 401.

The danger to be apprehended, and which the above statutory provision was evidently intended to guard against, has been recognized by our court, as may be seen in the language of Reese, C. J., in *Thurman v. State,* 27 Neb. 628, as follows: "No provision is made by law or the Constitution for any other challenges or objections to the jurors than those named. Jurors might then be called who, to the knowledge of the accused, were prejudiced against him and even might deny prejudice or bias or the formation of opinion (as the writer has seen done) for the express purpose of being retained upon the jury in order that a conviction might be secured. Could it be said that the constitutional provisions, that an accused should have a fair and impartial trial, had been complied with? Most certainly not." This conclusion is borne out by the pronouncements of other jurisdictions. In *People v. Evans* (72 Mich. 367) 40 N. W. 473, the rule is laid down: "After a juror has denied on his *voir dire* that he has said he believed respondent to be guilty, it may be shown by other witnesses that the juror had made such statement."

See, also, in support of this principle *State v. Cleary,* 40 Kan. 287; *United States v. Christensen,* 7 Utah, 26.

On this issue of fact the defendant was entitled to introduce and have received extrinsic evidence which, had it been received, would plainly have disclosed the incompetency of the juror in question. It follows, therefore, that the court erred in denying the right to the defendant to produce extrinsic evidence to sustain the challenge and support the issue of fact created thereby. In this connection it is to be noted that the issue of fact presented is the competency of the witness, and that the impeachment of the witness is not necessarily involved, and therefore the limitations imposed on impeaching questions as to foundation as to time, place, presence and substance of statement have no application.

Exceptions are also presented by the defendant to the failure of the court to instruct on the subject of "motive," an instruction covering that subject having been tendered by the defendant. It cannot be gainsaid that in the prosecution of crime evidence to establish a motive is competent, and if otherwise unobjectionable will be received for the consideration of the jury. It must also be conceded that evidence tending to establish the nonexistence of motive is likewise competent and is proper for the consideration of the jury. Indeed, the question of presence or absence of motive is often one of the most important factors in proceedings involving the prosecution of crime where the state is seeking to convict by circumstantial evidence. The importance of motive, therefore, suggests the necessity of proper instructions to the jury concerning the same, and while absence of all evidence of motive in a case may be conceded to be circumstances favorable to the defendant, still it is not the province of the court to instruct the jury of the weight or bearing to be given to any particular circumstance; yet this court is committed to the doctrine that the defendant is entitled to an instruction on the subject of motive, at least to the extent that the absence of all evidence of motive is a circumstance that should be considered by the jury in connection with all

other facts and circumstances in determining the guilt or innocence of the accused. It is thought an instruction on the subject of motive should have been given by the district court in the present case.

Prejudicial error appearing in the record, the conviction cannot be permitted to stand. The judgment is reversed and the cause remanded for further proceedings.

REVERSED.

SPLITTGERBER BROTHERS ET AL., APPELLEES, V. SKINNER PACKING COMPANY ET AL., DEFENDANTS: RALPH L. PETERSON, INTERVENER, APPELLANT.

FILED NOVEMBER 14, 1929. No. 26715.

APPEAL from the district court for Douglas county: ARTHUR C. WAKELEY, JUDGE. *Appeal dismissed.*

Congdon, Finlayson & Burke, for appellant.

North & O'Reilly, for appellees.

Ritchie, Chase, Canaday & Swenson, for defendants.

Heard before ROSE, DEAN, GOOD and DAY, JJ., and RAPER and REDICK, District Judges.

RAPER, District Judge.

In a cause brought by Splittgerber Brothers against Skinner Packing Company, the appellant, Ralph L. Peterson, filed a petition in intervention. The suit by Splittgerber Brothers was an action to rescind sale of stock in the Skinner Packing Company on the ground of false representations and to recover the sale price. Ralph L. Peterson claimed right to intervene as stockholder in another corporation which he alleged had agreed to assume the liabilities of the Skinner Packing Company and therefore he had such interest as gave him right to intervene in the suit against the Skinner Packing Company.

On the 9th day of January, 1928, the district court sustained a demurrer to the petition of intervention and dismissed it. January 31, 1928, the intervener filed motion

for new trial on the order dismissing his petition in intervention. That motion for new trial was overruled on May 4, 1928, and thereafter, on August 4, 1928, the intervener filed his appeal in this court. The plaintiff, Splittgerber Brothers, presented a motion in this court to dismiss the appeal of intervener because the motion for new trial was not filed in time fixed by law, and that the appeal was not perfected as required by the statutes.

If a motion for new trial was a necessary step in order to obtain a review in this court, it was not filed within the time fixed by law and was therefore of no effect. If, however, the presenting and overruling of a motion for new trial was not a necessary proceeding, then the appeal, having been lodged more than three months after the dismissal of intervener's petition, did not give this court jurisdiction of the appeal. Without determining whether, in an action at law, motion for new trial and overruling of same, on an order sustaining a demurrer and dismissing a petition in intervention, is a necessary prerequisite to effect an appeal to this court, it follows that in either event, as above stated, the appeal of intervener should be dismissed.

Appeal of Ralph L. Peterson, intervener, is dismissed at his costs.

APPEAL DISMISSED.

STANTON COUNTY ET AL. V. STATE BOARD OF EQUALIZATION AND ASSESSMENT.

FILED NOVEMBER 16, 1929. No. 27178.

For syllabus, see *Northwestern Bell Telephone Co. v. State Board of Equalization and Assessment*, p. 138, *post*.

ERROR to the State Board of Equalization and Assessment. *Increase of assessment vacated.*

Fay H. Pollock, for plaintiffs in error.

C. A. Sorensen, Attorney General, Clifford L. Rein and *L. Ross Newkirk, contra.*

C. H. Hendrickson, amicus curiæ.

Heard before GOSS, C. J., ROSE, DEAN, GOOD, THOMPSON, EBERLY and DAY, JJ.

DEAN, J.

The board of equalization and assessment, without notice, entered an order August 2, 1929, increasing the assessed valuation of the various grades of cattle in all counties throughout the state in the amount of 10 per cent. This action was begun by petition in error by Louis Smithberger and Theodor Lammli, taxpayers and citizens of the county of Stanton, in behalf of themselves and others similarly situated whose cattle assessments have been likewise increased in the same amount.

The questions of law and procedure herein are the same as in the case entitled *Northwestern Bell Telephone Co. v. State Board of Equalization and Assessment,* p. 138, *post,* and our decision is governed by the rule therein announced.

It follows that the order of the board of equalization increasing the assessed valuation of the various grades of cattle 10 per cent. must be and it hereby is vacated and held for naught.

JUDGMENT ACCORDINGLY.

LINCOLN TELEPHONE & TELEGRAPH COMPANY V. STATE BOARD OF EQUALIZATION AND ASSESSMENT.

FILED NOVEMBER 16, 1929. No. 27180.

For syllabus, see *Northwestern Bell Telephone Co. v. State Board of Equalization and Assessment,* p. 138, *post.*

ERROR to the State Board of Equalization and Assessment. *Increase of assessment vacated.*

Woods, Woods & Aitken, for plaintiff in error.

C. A. Sorensen, Attorney General, and *L. Ross Newkirk, contra.*

Heard before GOSS, C. J., ROSE, DEAN, GOOD, THOMPSON, EBERLY and DAY, JJ.

DEAN, J.

In view of the fact that the questions of law and of procedure involved in this action are practically identical with those involved in and decided in the case entitled *Northwestern Bell Telephone Co. v. State Board of Equalization and Assessment,* p. 138, *post,* we do not therefore find it necessary to extend this opinion by further discussion.

It follows that the order of the board of equalization increasing the assessed valuation of the telephone properties 20 per cent. must be and it hereby is vacated and held for naught.

JUDGMENT ACCORDINGLY.

NORTHWESTERN BELL TELEPHONE COMPANY V. STATE BOARD OF EQUALIZATION AND ASSESSMENT.

FILED NOVEMBER 16, 1929. No. 27181.

Constitutional Law: TAXATION: INCREASE OF ASSESSMENT. Where an increase in the assessed valuation of any class or classes of property, as returned by any county or counties, is made by the state board of equalization and assessment without notice to such county or counties, and without affording sufficient opportunity to be heard, such increase is in violation of section 5901, Comp. St. 1922, and amounts to confiscation of property without due process and is therefore a void increase of assessment.

ERROR to the State Board of Equalization and Assessment. *Increase of assessment vacated.*

F. E. Randall, A. G. McBean and *K. F. Oehler,* for plaintiff in error.

C. A. Sorensen, Attorney General, and *L. Ross Newkirk, contra.*

Heard before GOSS, C. J., ROSE, DEAN, GOOD, THOMPSON, EBERLY and DAY, JJ.

DEAN, J.

The state board of equalization and assessment, hereinafter called the board, was created under section 5898, Comp. St. 1922, and consists, *ex officio*, of four elective state officers, namely, the governer, the secretary of state, the state auditor, and the state treasurer, and also the tax commissioner. August 2, 1929, at a meeting of the board, an order was executed increasing the assessed valuation of all telephone properties throughout the state, in the sum of 20 per cent., as stated, for the year 1929, as reported by the abstracts of assessed property in the several counties. Thereupon, in due course, the board ordered that the 20 per cent. increase be duly certified to all county clerks to the end that such required increase might be regularly carried on the tax rolls. It clearly appears that the order complained of was entered by the board without notice to the counties making the return and without affording sufficient opportunity to be heard by the board. And it also appears that the board did not call any witnesses nor was any testimony whatever considered in respect of the increased valuation of the telephone property in question.

When the order which purports to increase the assessed valuation was published, plaintiff, under authority of section 5901, Comp. St. 1922, filed a petition for a writ of error wherein the assignments of alleged error were set out. And, pursuant to an order issued by this court, the writ was allowed and the subject-matter of the controversy is now before us for final decision on the merits.

Section 5901, above cited, provides that the board shall issue a notice to the counties which it deems under-valued or over-valued on the tax list, as the facts may appear to warrant, and it is also provided in the same section that the board thereupon "shall set a date for hearing at least five days following the mailing of such notice. At such hearing legal representatives of the counties may appear and show cause why the valuation or valuations of their county should not be increased or decreased by the state board, and after a full hearing, the state board shall enter

its order and certify the same to the county clerks of the proper counties as hereinbefore set forth in this section."

Plaintiff, as herein noted, contends and it is not denied, that no notice was given by the board that a hearing would be held in respect of the proposition to raise the assessed valuation, and that no opportunity was given to the company to submit evidence thereon. In 3 Cooley, Taxation (4th ed.) sec. 1123, the learned author says:

"But as an increase in an assessment is not frequent, and will seldom be anticipated by the taxpayer, who will not be likely to attend upon the review except to seek a reduction, it seems safer and more just to hold, as has generally been done, that the taxpayer should have personal notice of any purpose to increase the assessment made against him."

In *Bankers Life Ins. Co. v. County Board of Equalization*, 89 Neb. 469, we adopted the following rule, and it is, in principle, plainly in point here:

"The taxpayer has a right to rely upon his sworn return made to the assessor, unless notice is given him of an intention to increase the amount thereof. A change of schedule without notice should be treated as a complaint made by the assessor to the board of equalization, and notice should be given of such complaint and an opportunity for a hearing should be afforded. Any substantial increase of the schedule without notice and an opportunity for a hearing amounts to the taking of the property of a citizen without due process of law, and is void."

Substantially a like rule prevails in many of our sister states. The rule in New York follows:

"A law imposing an assessment for a local improvement without notice to, and a hearing, or an opportunity to be heard, on the part of the owner of the property to be assessed, has the effect to deprive him of his property without 'due process of law,' and is unconstitutional. * * * So, also, it is immaterial that the assessment has been in fact fairly apportioned, the constitutional validity of the act is to be tested, not by what has been, but by what may be done under it." *Stuart v. Palmer*, 74 N. Y. 183.

In *Dahnke-Walker Co. v. Bondurant*, 257 U. S. 282, 289,

the court said: "A statute may be invalid as applied to one state of facts and yet valid as applied to another. * * * Besides, a litigant can be heard to question a statute's validity only when and so far as it is being or is about to be applied to his disadvantage."

In Michigan this rule was announced: "A taxpayer's assessment cannot be raised by a city board of review without such notice to him as will enable him to appear and object to the valuation on which it rests; if raised without such notice he is only liable upon the former assessment, and if he pays the whole under protest he can recover back the excess in an action against the city therefor." *Avery v. East Saginaw,* 44 Mich. 587.

The supreme court of Kansas held: "Before the county commissioners have power to raise the valuation of personalty, notice must be given the taxpayer, and he have an opportunity to show that the valuation returned is correct." *Kansas Pacific R. Co. v. Russell,* 8 Kan. 558. See, also, *McConkey v. Smith,* 73 Ill. 313; *County Commissioners of Alleghany County v. New York Mining Co.,* 76 Md. 549.

South Platte Land Co. v. Buffalo County, 7 Neb. 253, is an early case wherein this rule was announced:

"The county commissioners, acting as a board of equalization, cannot raise the assessment on property without giving notice to the owner; and if they do so increase the assessment of property without notice, they act without jurisdiction of the person or subject-matter, and their proceedings are void, and of no effect."

The great weight of authority, as disclosed by text-writers and adjudicated cases, clearly holds to the proposition that an assessed valuation of property cannot be increased without due notice to the owner of such property, and this to the end that he may first be heard. Where an increase in the assessed valuation of any class or classes of property, as returned by any county or counties, is made by the state board of equalization and assessment without notice to such county or counties, and without affording sufficient opportunity to be heard, such increase is in vio-

lation of section 5901, Comp. St. 1922, and amounts to confiscation of property without due process and is therefore a void increase of assessment.

It follows that the order of the board of equalization complained of herein which, in express terms, increases the assessed valuation of the property in suit 20 per cent. must be, and it hereby is, vacated and held for naught.

JUDGMENT ACCORDINGLY.

AMERICAN TELEPHONE & TELEGRAPH COMPANY V. STATE BOARD OF EQUALIZATION AND ASSESSMENT.

FILED NOVEMBER 16, 1929. No. 27184.

For syllabus, see *Northwestern Bell Telephone Co. v. State Board of Equalization and Assessment, ante*, p. 138.

ERROR to the State Board of Equalization and Assessment. *Increase of assessment vacated.*

Morsman & Maxwell, for plaintiff in error.

C. A. Sorensen, Attorney General, and *L. Ross Newkirk, contra.*

Heard before GOSS, C. J., ROSE, DEAN, GOOD, THOMPSON, EBERLY and DAY, JJ.

DEAN, J.

In view of the fact that the questions of law and of procedure involved in this action are practically identical with those involved in and decided in the case entitled *Northwestern Bell Telephone Co. v. State Board of Equalization and Assessment, ante*, p. 138, we do not therefore find it necessary to extend this opinion by further discussion.

It follows that the order of the board of equalization increasing the assessed valuation of the telephone properties 20 per cent. must be and it hereby is vacated and held for naught.

JUDGMENT ACCORDINGLY.

FRANK E. FOLTS ET AL., APPELLEES, V. GLOBE LIFE INSURANCE COMPANY ET AL., APPELLEES: SOVEREIGN CAMP, WOODMEN OF THE WORLD, APPELLANT.

FILED NOVEMBER 22, 1929. No. 27128.

1. **Costs:** ATTORNEY'S FEES. In a proceeding instituted by members of a fraternal insurance association, in its behalf, to recover personal property belonging to such association which has been wrongfully and unlawfully transferred to another company, and where in such proceeding such members are successful, they are entitled to have taxed as costs a reasonable sum for their attorney's fees, to be paid by the fraternal insurance association.
2. **Stipulations:** AFFIDAVITS AS EVIDENCE. Error may not be predicated on the ruling of the trial court in overruling an objection to introduction in evidence of affidavits, where it appears that, previous to the trial, in open court the parties had agreed to the use of affidavits as evidence.

APPEAL from the district court for Lancaster county: FREDERICK E. SHEPHERD, JUDGE. *Affirmed as modified.*

Gaines, McGilton, Van Orsdel & Gaines, Brogan, Ellick & Raymond, D. E. Bradshaw and *Hainer, Flansburg & Lee,* for appellant.

John M. Stewart, C. J. Campbell, William B. Price, Don W. Stewart, John P. Breen, G. E. Hager, M. L. Donovan and *W. H. Hatteroth, contra.*

Heard before GOSS, C. J., ROSE, GOOD, THOMPSON, EBERLY and DAY, JJ., and THOMSEN, District Judge.

PER CURIAM.

This is the second appeal to this court in this cause. The opinion on the first appeal is reported in *Folts v. Globe Life Ins. Co.*, 117 Neb. 723. Thereafter a supplemental issue was presented in the district court, asking for an allowance of attorney's fees for plaintiffs and intervener, and on this issue judgment was rendered in their favor in the sum of $60,000. From this judgment Sovereign Camp, Woodmen of the World, appeals, and plaintiffs and intervener cross-appeal.

By reference to the opinion of this court on the former appeal, it will be seen that the main action was brought by members of Sovereign Camp, Woodmen of the World, hereinafter referred to as W. O. W., a fraternal insurance association, on its behalf, and to recover from the Globe Life Insurance Company, hereinafter referred to as defendant, cash and bonds, the property of W. O. W., which its officers had wrongfully and unlawfully transferred to defendant for the latter's capital stock, and for other relief. In the main proceeding the relief sought by plaintiffs and intervener was granted, and there were recovered cash and bonds, of the approximate value of $1,700,000, which were returned to the treasury of W. O. W.

Counsel for W. O. W. argue that the action is not one wherein an attorney's fee should be allowed. With this contention we are unable to agree. The main action was brought by individual members of a fraternal society, on its behalf, to recover property belonging to it which its officers had wrongfully transferred to defendant. By their efforts W. O. W. profited in the return of its cash and bonds, and also profited in other ways pointed out on the first appeal. Under such circumstances the plaintiffs were entitled to be reimbursed for the reasonable costs of attorney's fees incurred in behalf of the fraternal order. *Stone v. Omaha Fire Ins. Co.*, 61 Neb. 834; *In re Estate of Creighton*, 93 Neb. 90.

Counsel for W. O. W. complain because the district court allowed affidavits, as to the value of services of attorneys, to be received in evidence. The record discloses that when both parties to the appeal were represented in the trial court an agreement was entered into which fairly and reasonably contemplated that either party might file affidavits in support of his contention. Under the circumstances, the trial court did not err in permitting affidavits to be used. It may be remarked that W. O. W. was not limited to the filing of affidavits, but was permitted to call and examine witnesses orally as to the value of the services rendered.

It is next contended that the evidence does not warrant

the allowance of so large a sum as $60,000. The evidence is in conflict. The testimony of many eminent, well-informed attorneys as to the value of legal services was taken, and their estimates varied from as low as $20,000, on behalf of W. O. W., to as high as $140,000, on behalf of the plaintiffs. From the record it appears that much effort and time were spent in taking evidence upon an issue not involved in the present case, but which belonged in another case having no connection with the present action.

After a careful consideration of the record, we are of the opinion that the allowance is somewhat more liberal than justice requires. In our opinion, based upon the entire record, $50,000 is a fair and reasonable compensation to be paid to the attorneys for plaintiffs and intervener in the present action, in full for their services in both the district and supreme court.

The cross-appeal of plaintiffs and intervener goes to the question of the amount allowed, and they contend that a greater sum than $60,000 should have been allowed. The observations heretofore made dispose of the cross-appeal.

The judgment of the district court is therefore modified so as to allow plaintiffs and intervener, as counsel fees, the sum of $50,000, and, as modified, the judgment is affirmed.

AFFIRMED AS MODIFIED.

STATE, EX REL. WILLIAM W. LANHAM, APPELLEE, V. CHARLES H. SHEETS, APPELLANT.

FILED NOVEMBER 22, 1929. No. 26806.

1. Elections: MARKING BALLOTS: DIRECTORY PROVISIONS. That part of section 1969, Comp. St. 1922, as amended by chapter 115, Laws 1925, requiring the voter to "make a cross in the square to the left of every candidate for whom he desires to vote," is directory merely, and a substantial compliance therewith whereby the intention of the voter is clearly indicated entitles the vote to be counted.
2. ———: ———: ———. Paragraph 4, Schedule B, sec. 1951, Comp. St. 1922, as amended and reenacted by chapter 116, Laws 1925, requiring the voter to make a cross in the

square opposite the written name on the ballot, construed with sections 1979 and 2028 and *held* to be directory.

3. ———: ———: WRITING IN NAMES. The writing in, at the proper place on a ballot, of the name of a person is a sufficient indication of the intention of the elector to vote for such person, so as to entitle such ballot to be counted, though no cross is made opposite such written name.
4. **Appeal:** BILL OF EXCEPTIONS. Affidavits in support of a motion for new trial not embodied in a bill of exceptions will not be considered on appeal.
5. **Decisions Disapproved.** *Martin v. Miles*, 46 Neb. 772, and *Mauck v. Brown*, 59 Neb. 382, disapproved in part.

APPEAL from the district court for Dawson county: ISAAC J. NISLEY, JUDGE. *Affirmed.*

W. A. Stewart, for appellant.

N. M. York, contra.

Heard before GOSS, C. J., ROSE, DEAN, GOOD, THOMPSON, EBERLY and DAY, JJ., and REDICK, District Judge.

REDICK, District Judge.

This is a proceeding in *quo warranto* to test the respective rights of the relator, William W. Lanham, and the respondent, Charles H. Sheets, to the elective office of member of the board of education of school district No. 11 in Dawson county. The matter was tried to the court and resulted in a judgment declaring the relator duly elected to said office and that respondent be ousted from the same, and the latter appeals.

The facts are undisputed, and the controversy arises over the legality of certain ballots, 37 in number, cast for the relator. Without counting these disputed ballots the respondent received 274 votes and the relator 252; but, if the disputed ballots are to be counted, the relator received 289 votes, and upon a recount 291 votes, thereby giving him the majority entitling him to the office.

The names of only two candidates were printed on the ballot, "B. G. Richey, Peoples Ticket," and "C. H. Sheets, by Petition, and Citizens Ticket." All the votes for relator were written on the ballot in the place provided for that

purpose, and a cross placed by the voter in the square to the left of the written name, in every case except in the 37 disputed ballots. The respondent claims that these latter ballots are invalid and should not be counted because of the failure of the voter to place a cross opposite the written name; the relator *contra*. The solution of the problem depends upon the proper construction of certain sections of the Australian ballot law and whether or not the provisions thereof material to the inquiry are mandatory or directory.

The Australian ballot law in this state was first enacted in 1891 (Laws 1891, ch. 24) and contained, among others, the following provisions concerning the manner of voting; only such parts being quoted as are material to our inquiry:

"Section 13. Nothing in this act contained shall prevent any voter from writing on his ballot the name of any person for whom he desires to vote, for any office, and such vote shall be counted the same as if printed upon the ballot and marked by the voter."

"Section 20. The elector shall then forthwith proceed alone into a compartment, if one be then unoccupied, and shall prepare his ballot by marking in the appropriate margin or place a cross (X) with ink opposite the name of the candidate of his choice for each office to be filled, or by filling in with ink the name of the candidate of his choice in the blank space provided therefor, and marking a cross (X) with ink opposite thereto."

Cards of instruction for the voters were provided by Schedule B of the act, and contained the following:

"7. If you wish to vote for any person whose name does not appear upon the ballot, write or insert his full name in the blank space on the ballot under the proper office you wish him to hold, and make a cross mark in the proper margin opposite the same."

These provisions, in substantially the same language, remained in force until 1917 (Laws 1917, ch. 33) when the section providing for the manner of marking the ballots was amended by omitting that portion of section 20 of

the act of 1891, quoted above, and subsequent acts amendatory thereto, providing for writing in the name of the person for whom the voter desired to vote (whose name was not printed on the ballot) and marking a cross opposite. But this last act contained the following:

"If the voter does not wish to vote a straight ticket he shall make a cross in the square to the left of every candidate for whom he desires to vote." Laws 1917, ch. 33, sec. 3.

With the exception of the provision quoted from section 20, ch. 24, Laws 1891, the excerpts contained in the above quotations are the law at this time. See Comp. St. 1922, secs. 2028, 1979, and section 1969, as amended by chapter 115, Laws 1925, and section 1951, as amended by chapter 116, Laws 1925. It will be noted that prior to the act of 1917 the special requirement that a cross be placed opposite a name written in the ballot was contained in the main body of the act as well as in the instructions to voters in Schedule B, whereas since such amendment it appears only in the schedule. Is the requirement mandatory so that a failure to comply with it invalidates the ballot, or is it merely directory so that the ballot may be received and counted if the intention of the voter may be clearly determined therefrom?

In support of his contention that the requirement in question is mandatory, appellant cites *Mauck v. Brown*, 59 Neb. 382, and *State v. Hogeboom*, 103 Neb. 603, but neither of these cases involved the precise point under discussion. Neither of them involved ballots in which the name of a candidate was written in and no cross placed opposite such name. In the latter case the name was written in but a cross placed opposite. Appellant also cites *Martin v. Miles*, 46 Neb. 772, holding:

"The provision of section 20, act of 1891 ('Australian Ballot Law'), for the expressing of the voter's intention by a mark opposite the name of the candidate of his choice, is mandatory, and the manner thus prescribed is exclusive of all others; and such is the rule whether the names of candidates be printed on the ballot or written thereon by the voter."

The questioned ballots in that case were marked precisely the same as in this—the names were written in but no cross placed opposite. The case is therefore squarely in point, and, if adhered to, would require a reversal of the judgment. We are not, however, entirely satisfied with that decision. The learned judge who wrote that opinion does not refer to section 25 of that act, which reads as follows:

"In the canvass of the votes any ballot which is not indorsed, as provided in this act, by the signature of two (2) judges upon the back thereof, shall be void and shall not be counted, and any ballot or parts of a ballot from which it is impossible to determine the elector's choice shall be void and shall not be counted: *Provided,* that when a ballot is sufficiently plain to gather therefrom a part of the voter's intention, it shall be the duty of the judges of election to count such part."

Of course, the object of the election is to determine the will of the majority of the electors as to whom they desire to fill the offices, and it seems to us that, by the provision just quoted, the legislature intended to insure the counting of all ballots from which the intention of the voter could be clearly gathered, regardless of the particular manner in which such intention was evinced. There should be no need for discussion of what the voter meant by writing in the name of a party in the proper place upon the ballot. He was authorized so to do only for the specific purpose of indicating the candidate for whom he desired to vote. We can conceive of no other purpose he could have, and certainly he could accomplish none other. An intention to vote for the party whose name is written in is the only logical conclusion to be drawn from the fact, in view of the declared purpose for which it was authorized. The statute declares a simple manner in which the voter may indicate his intention, by placing an X opposite the name, and then declares that the vote shall be counted if the ballot is sufficiently plain to gather the voter's intention. This latter provision was evidently inserted to prevent the disfranchisement of the voter by reason of

his failure to technically comply with every requirement of a somewhat complicated law. It may further be noted that that decision was based in part upon the provision of section 20, requiring a mark opposite the written name, whereas such provision, though continued in subsequent statutes, was eliminated by the amendment of 1917 (Laws 1917, ch. 33, sec. 3) which did not deal with the question of writing in the names of candidates, but merely provided that the voter "shall make a cross in the square to the left of every candidate for whom he desires to vote." We think that the application of this requirement should be confined to the ballot as printed, especially in view of section 13, above quoted, which requires the counting of ballots for candidates whose names are written in, without reference to any other marking. True, the amendment of 1917 did not disturb paragraph 7 of the schedule, but it did eliminate such requirement from the body of the act. The legislature must have had some purpose in adopting the amendment; but if the law was to remain the same notwithstanding such adoption the amendment would be of no effect.

Section 13 and paragraph 7 of the schedule are in apparent contradiction, one requiring the vote to be counted when the name is written in, and the other requiring something further to be done. If we were required to choose between the two provisions, we would unhesitatingly select section 13 as being more favorable to an untrammeled expression of the will of the voter. We prefer, however, to hold the provision of paragraph 7 to be merely directory as indicating the method by which the voter may express his choice. We are sustained in this by a number of decisions of this court. In *State v. Russell*, 34 Neb. 116, at a time when the statute required that the marking be done in ink, it was held that a pencil marking was a substantial compliance. To the same effect, *Spurgin v. Thompson*, 37 Neb. 39. In *Bingham v. Broadwell*, 73 Neb. 605, ballots were counted where the mark was an "H," or a wheel, or a star-like mark, and a number of other irregularities were shown, but the intention of

the voter was clear. In *Griffith v. Bonawitz,* 73 Neb. 622, a number of irregular marks were held not to invalidate the ballot. There were also some ballots where a name was written in and no mark placed opposite it. Whether or not these last ballots were counted is not clear, but the court, after referring to that fact, said that only one class of ballots called for special discussion, to wit, those indorsed by one judge of election and by the initials of another. It was further held in that case: "On the trial of a contested election ballots will not be treated as void simply because of irregular or unauthorized markings or mutilations which appear to have been innocently made as the result of awkwardness, inattention, mistake, or ignorance, if the lawful intent of the voter can be ascertained therefrom." In *White v. Slama,* 89 Neb. 65, ballots marked by drawing a straight line through the party circle, instead of marking a cross therein, were held valid. In *Shaw v. Stewart,* 115 Neb. 315, a controlling number of ballots had the name of one of the candidates written in and a cross placed opposite, although the name of such candidate was printed upon the ballot, and while the statute only authorized writing the name in cases where it was not so printed, the ballots were held valid. Such provisions, as well as that requiring the making of a cross in the square opposite the written name, were said to be directory only. In that case we cited *Gauvreau v. Van Patten,* 83 Neb. 64, which quoted with approval the following from 2 Wigmore, Australian Ballot System, 193 (Appendix):

"Wherever our statutes do not expressly declare that particular informalities avoid the ballot, it would seem best to consider their requirements as directory only. The whole purpose of the ballot as an institution is to obtain a correct expression of intention; and if in a given case the intention is clear, it is an entire misconception of the purpose of the requirements to treat them as essentials, that is, as objects in themselves, and not merely as means."

In *State v. Russell,* 34 Neb. 116, *supra,* after stating the

two principles governing the construction of statutes of this character to be: (1) The supremacy of the legislative will; and (2) to give effect to the expressed will of the majority, it was said:

"Recognizing the principle first stated the courts have uniformly held that when the statute expressly or by fair implication declares any act to be essential to a valid election, or that an act shall be performed in a given manner and no other, such provisions are mandatory and exclusive. By an application of the second principle, the courts, in order to give effect to the will of the majority and to prevent the disfranchising of legal voters, have quite as uniformly held those provisions to be formal and directory merely, which are not essential to a fair election, unless such provisions are declared to be essential by the statute itself."

Sections 2025 to 2030, Comp. St. 1922, define the causes for which a ballot may be rejected, but do not include a failure of the voter to comply strictly with directions as to marking. It seems perfectly clear that a precise method of marking the ballot is not essential to a fair election, where the method selected clearly indicates the voter's choice, and no question of fraud, or violation of statutes essentially mandatory, is involved. To hold otherwise might result in a defeat of the very object sought by the election, by placing in office a candidate not desired by a majority of the voters.

All of the cases above cited, beginning with *State v. Russell,* in effect hold that the provisions as to the manner of marking the ballot are merely directory, and that where the intention of the voter is clearly apparent, though not expressed in the precise manner of the statute, the ballot should be counted. We consider this a correct expression of the law. Upon a careful consideration of the provisions of the statute, the purpose of the law, and our previous decisions thereon, we are of the opinion that the provisions of paragraph 7, above quoted, now, substantially, paragraph 4 of Schedule B, section 1951, Comp. St. 1922, as amended by chapter 116, Laws 1925, and sec-

tion 1969, as amended by chapter 115, Laws of 1925, requiring the placing of a cross in the square to the left of every candidate for whom it is desired to vote, must be considered merely directory, and that the disputed ballots were properly counted.

In so far as the cases of *Martin v. Miles*, 46 Neb. 772, and *Mauck v. Brown*, 59 Neb. 382, conflict with the opinions herein expressed, they are disapproved. It is not necessary to discuss other questions presented by the briefs.

A motion for a new trial was filed by the appellant in the court below, on the ground of newly discovered evidence, and was overruled, upon which ruling the appellant assigns error. We are unable to review the action of the court in that regard because the affidavits upon which such ruling was based have not been preserved by proper bill of exceptions, and we cannot consider them. *Omaha Fire Ins. Co. v. Dierks & White*, 43 Neb. 473. Moreover, by stipulation of the parties in this record, appellant received 274 votes and appellee 252 votes about which there is no controversy. The additional votes, if counted, gave the appellee a majority.

Finding no error in the record, the judgment of the district court is

AFFIRMED.

ABIE STATE BANK ET AL., APPELLEES, V. ARTHUR J. WEAVER, GOVERNOR, ET AL., APPELLANTS.

FILED DECEMBER 7, 1929. No. 27070.

1. **Banks and Banking: REGULATION.** "The banking business, carried on pursuant to a state charter, is quasi-public and, for protection of the public and in its interests, is subject to reasonable regulation by the state." *Citizens State Bank v. Strayer*, 114 Neb. 567.
2. **Constitutional Law: STATUTES: CONSTRUCTION.** It is elementary that it is not within the province of the courts to annul a legislative act unless its provisions so clearly contravene a provision of the fundamental law, or it is so clearly against public policy, that no other resort remains.

3. **Banks and Banking: GUARANTY FUND: LEVIES: ESTOPPEL.** Where a state bank has accepted the benefits arising from the deposits of money pursuant to the terms of the bank depositors' guaranty law, such bank should not be heard, in a proper case, to make complaint of a special assessment upon such deposits which has been levied for the benefit of the depositors' guaranty fund.
4. ———: ———: ———: CONSTITUTIONAL LAW. Where a special assessment has been levied upon the state banks pursuant to the provisions of section 8028, Comp. St. 1922, as amended by section 26, ch. 191, Laws of 1923, such assessment does not constitute the taking of private property without due process.

APPEAL from the district court for Lancaster county: LINCOLN FROST, JUDGE. *Reversed and dismissed.*

C. A. Sorensen, Attorney General, Charles E. Abbott, Edgar Ferneau, L. Ross Newkirk and *Roy M. Harrop*, for appellants, Weaver and others.

William J. Hotz, Clinton J. Campbell, Frank A. Hebenstreit, Ralph G. Coad and *Robert Hotz*, for intervening appellants.

Gaines, McGilton, Van Orsdel & Gaines, Courtright, Sidner, Lee & Gunderson and *Hainer, Flansburg & Lee, contra.*

Albert S. Johnston, amicus curiæ.

Heard before GOSS, C. J., ROSE, DEAN, GOOD, THOMPSON, EBERLY and DAY, JJ.

DEAN, J.

This is an injunction suit begun in the district court for Lancaster county by the Abie State Bank, plaintiff, on its own behalf, and in which plaintiff is joined by 558 other Nebraska state banks. The suit was brought to enjoin the collection of a special assessment of one-fourth of one per cent. of the average daily deposits from the state banks for 1928. It is alleged by plaintiff that the special assessment complained of was made December 15, 1928, by the department of trade and commerce, for the benefit of the

depositors' guaranty fund, pursuant to authority conferred by section 8028, Comp. St. 1922, as amended by section 26, ch. 191, Laws of 1923. The act, as amended, follows:

"If the depositors' guaranty fund shall, from any cause, be depleted or reduced to any amount less than one per cent. of the average daily deposits as shown by the last semi-annual assessment statement thereof filed, the department of trade and commerce shall levy a special assessment against the capital stock of the corporations governed by the provisions of this article, to cover such deficiency, which special assessment shall be based on the said average daily deposits, and, when required for the purpose of immediate payment to depositors, said special assessment may be for any amount not exceeding one per cent. of said average daily deposits for the year 1923 and thereafter not exceeding one-half of one per cent. of said average daily deposits in any one year."

The governor of Nebraska and the secretary of the department of trade and commerce are both made parties defendant in official capacity. The state treasurer and a number of individual bank depositors intervened in the action adversely to the plaintiff's contention. The court, however, found generally in favor of the plaintiff bank and against the defendants and interveners. Thereupon defendants were ordered to pay all costs of the action, except those incurred by the interveners, and the cross-petitions of the interveners were dismissed and interveners ordered to pay their own costs. Defendants and a number of the interveners have appealed.

The secretary of the guaranty fund commission, hereinafter called the secretary, testified that up to and including December 31, 1928, 269 state banks were closed by the state and placed in the hands of the commission, and that the total amount of the adjudicated claims was then $10,536,518.59, exclusive of interest; and that in 72 state banks, then being operated as going concerns, the amount due depositors was $13,726,441.26, and the total amount due depositors in banks which were in receivership, but whose claims were not yet adjudicated, was $2,133,627.54.

It also appears from the secretary's evidence that the total amount, including claims adjudicated, and claims not adjudicated, or present liabilities against the guaranty fund, was $26,400,282.76, and that the total sum of assets to be realized would be $10,451,932.65, leaving $15,948,350.11 as a deficit. The secretary also testified that the majority of the losses sustained by the banks resulted from loans made prior to 1923 during the deflation period.

From the evidence of Clarence G. Bliss, secretary of the department of trade and commerce, it appears that since 1919 the total amount of bank assessments was $14,609,576.65, and that these assessments, in the above sum, were paid over and became a part of the guaranty fund.

It appears from the evidence of the president of one of the largest Nebraska state banks that he was active in the publication of 2,000 pamphlets which were distributed generally in respect of the establishment of the guaranty fund, and he was also chairman of a committee of three bankers by whom this suit was begun. In his expressed opinion, the payment of the special assessment, and its continuance for a number of years, would have the effect of causing the large state banks to "nationalize—all who can will nationalize and the balance will go out of business. I think four hundred banks will be operating with impaired capital."

In 1926, during the months of June, July, August, and September, twenty-six, full-page newspaper advertisements, attractively featured with pictures and aptly prepared reading matter, appeared in one of Omaha's leading newspapers. These advertisements stressed the proposed protection that was shortly to be afforded the depositors of money in the state banks throughout Nebraska. And on one page of these advertisements 336 banks are listed as having paid their *pro rata* share of the cost of the publication. The largest state bank, located in Omaha, paid between $500 and $600 as its share of the expense of this newspaper publicity. The enterprise was given wide circulation in practically every town and its suburbs where a state bank was located, by illustrated newspapers with

reading matter that was calculated to attract favorable attention, and the patronage as well, of those having money for bank deposit. Following are some of the headings of the illustrated pages:

"A Story no other State can Tell;" "No Mattress Banks in Nebraska;" "Strong Banks make Strong States;" "In the Hands of Skilled Bankers;" "State Banks Protect Their Deposits in Nebraska;" "Nebraska is a Remarkable State;" "Pushing Your Money Through the Window;" "In Nebraska the Guarantee Works both Ways;" "All Work together in Nebraska;" "Safe Through the Slump of Deflation Days." "The Men Who Told the Story that No Other State Can Tell" concludes the series of illustrated pages, and is followed by an enumerated list of 336 state banks that sponsored the depositors' guaranty fund enterprise.

From the evidence it clearly appears that a majority of the state bankers throughout Nebraska, and many others as well, counted the bank depositors' guaranty fund, in its inception, a valuable asset, and many predicted that this beneficent plan would add greatly to the stability of the state banks. To illustrate this feature of the guaranty fund law, a brief excerpt from an advertisement which appeared in January, 1928, in one of the Nebraska papers having a large circulation, may be noted:

"First, there are a few state bankers here and there who have good banks and who think they are greatly imposed upon by being compelled to pay an assessment to the guaranty fund. This is a natural feeling as they are in no way responsible for the banks that fail. * * * The guaranty fund, so-called, is merely an insurance company whereby the state banks of Nebraska are the members and must pay through an assessment each other's losses up to the maximum amount of six-tenths of one per cent. a year. * * * Any good bank, making a fair profit, can pay this assessment without injury to itself and can do so to the great benefit of the state."

In respect of the many failures of banks about this time, the cashier of a Lincoln state bank testified that, in his opinion, the failure of nearly 300 Nebraska state banks

was caused largely by the general economic condition existing prior to 1928; that he did not think the bank assessments from 1923 to July 1, 1928, were a contributing factor in the failure of banks during that period, and that, in his opinion, the guaranty fund law and the assessments collected thereunder had a steadying influence on the deposits of every state bank. Continuing, he testified that "it is no exaggeration to say it has accounted for at least one hundred million dollars deposited in the state banks of Nebraska which would not otherwise have been made except for the bank guaranty law." In his opinion, the conditions of the banks and their ability to pay the assessment is "incomparably better than in 1923."

In the present case, the trial court found that the guaranty fund was confiscatory, and that its enforcement constituted the taking of private property without due process, and that there should therefore be an indefinite abatement of the enforcement of the act until such time as such enforcement could be made without mischievous consequences. It may be observed, however, that the bank guaranty fund law has been held by the highest court in the land to be a constitutional act and well within the meaning of the federal Constitution.

Substantially like questions as here involved were considered and decisions were rendered by the supreme court of the United States in *Noble State Bank v. Haskell*, 219 U. S. 104, and *Assaria State Bank v. Dolley*, 219 U. S. 121, and in both cases it was held that the act was not repugnant to the provisions of the Constitution. And in *Shallenberger v. First State Bank*, 219 U. S. 114, a case involving the validity of the guaranty fund law of our own state, the act was again upheld on authority of the decision in the above cited *Noble State Bank* case. In its memorandum opinion (219 U. S. 575) denying the application for rehearing in the *Noble State Bank* case, the court said:

"Even where powerful arguments can be made against the wisdom of (this) legislation this court can say nothing, as it is not concerned therewith." And in the body of the opinion, Mr. Justice Holmes, the author of the opinion, among others, made this observation:

"We fully understand the practical importance of the question and the very powerful argument that can be made against the wisdom of the legislation, but on that point we have nothing to say, as it is not our concern. * * * The payment can be avoided by going out of the banking business, and is required only as a condition for keeping on, from corporations created by the state."

First State Bank of Claremont v. Smith, 49 S. Dak. 518, is cited by defendants and is in point. The court there observed that the banks had for many years accepted the benefits of the guaranty fund law and in consequence were not then in position to resist the just claims of depositors. The court also observed that the personal rights of the individual must always yield to the "rightful exercise of the police power."

The Nebraska statute contains this provision for the direction of those who are charged with the administration of banking:

"The business of banking, or the receiving of deposits of money or instruments of credit subject to be repaid upon check, draft, certificate, passbook or order; the discounting, negotiating of promissory notes, drafts, bills of exchange, and other evidences of debts; and the loaning of money upon personal or other security is hereby declared to be a quasi-public business and subject to regulation and control by the state." Comp. St. 1922, sec. 7983.

"The banking business, carried on pursuant to a state charter, is quasi-public and, for protection of the public and in its interests, is subject to reasonable regulation by the state." *Citizens State Bank v. Strayer,* 114 Neb. 567.

It may here be noted that the maximum amount of the guaranty fund special assessment was reduced by the legislature in 1923 from one per cent. to one-half of one per cent., but subsequently the department of trade and commerce, pursuant thereto, levied the special assessment of one-fourth of one per cent., within the maximum amount now fixed by the legislature, and of which complaint is now made by the plaintiff bank on its own behalf and in behalf of 558 other state banks, as above noted.

The paramount object, and clearly the legislative intention in the creation of the depositors' bank guaranty fund law, was first for the protection of the depositors' money in the state banks. And from the fact that, under normal banking conditions, such act would likewise benefit the state banks, such banks were, at least, not unfriendly to the enactment of the law in question. But it goes without saying that there never was, nor could be, any compulsion upon the state banks to accept deposits of money on the bank guaranty basis. But money was accepted by the state banks, pursuant to the terms of the depositors' guaranty fund law, and by that law such banks are clearly bound.

The demands on the guaranty fund are burdensome, but the situation before us was created, or in any event was made possible, by the legislature in the enactment of the law. It is a basic principle that it is, ordinarily, not within the province of the courts to annul a legislative act except as a last resort and in a case where no other remedy is at hand. In view of the benefits which arose from the deposits of large sums of money in state banks, pursuant to the terms of the bank depositors' guaranty fund, should the banks now be heard to make complaint of the special assessment of one-fourth of one per cent. upon their deposits? Have the observations of Mr. Justice Holmes in the *Noble State Bank* case, above cited, ever been answered? If so, our attention has not been directed thereto.

For the reasons herein appearing, the temporary injunction granted by the district court is dissolved, the judgment is reversed, and the action dismissed.

REVERSED AND DISMISSED.

Eberly, J., concurs in the result.

Rose and Day, JJ., dissent.

JOHN HILLIARD PETERS, APPELLANT, V. NORTHWESTERN MUTUAL LIFE INSURANCE COMPANY ET AL., APPELLEES.

FILED DECEMBER 10, 1929. No. 26843.

1. **Wills**: CONSTRUCTION. Under section 5594, Comp St. 1922, "The court, without much regard to the canons of construction, will place itself in the position of the testator, ascertain his will, and, if lawful, enforce it." *In re Estate of Combs*, 117 Neb. 257.
2. ———: ———. "The rules of law," mentioned in section 5594, Comp. St. 1922, do not mean rules of construction in conflict with the very rule of construction sought to be established by this statute, requiring the intent of the testator to be followed "so far as such intent is consistent with the rules of law."
3. ———: ———. In all the circumstances involved and shown in the opinion, *held*: (1) That the will of the testator devised to appellant the fee simple title to the land involved; and (2) that the restriction on alienation for the term provided in the will was a valid restriction.
4. ———: VIOLATION OF RESTRICTIONS AGAINST ALIENATION. Whether a violation of restrictions against alienation of a fee simple title, devised by will, exists and supports a right of action in equity is a question to be determined by the facts and law in each individual suit.
5. **Quieting Title**: LACHES. In all the circumstances involved and shown in the opinion, *held*: (1) That the conveyance made by the appellant before the end of the restrictive period was voidable, and not void; and (2) in view of the acts and conduct of appellant, and in view of the fact that he waited so long after the period of restriction had expired before bringing the suit, that his right to set aside his deed was barred.

APPEAL from the district court for Stanton county: CHARLES H. STEWART, JUDGE. *Affirmed.*

Thomas E. Conley, Hasselquist & Chew and *Adolph Wenke*, for appellant.

Foster & Anderson, Charles H. Kelsey and *Fay H. Pollock, contra.*

Heard before GOSS, C. J., ROSE, DEAN, GOOD, THOMPSON, and DAY, JJ., and THOMSEN, District Judge.

GOSS, J.

John Hilliard Peters appealed from the judgment of the trial court, refusing to quiet in him the title to 200 acres of land in Stanton county, and quieting the title in the appellee, William F. Schulz, subject to a mortgage in favor of appellee, Northwestern Mutual Life Insurance Company, decreed to be a first lien.

The land came to Peters in 1915 through the duly probated will of his father, John Peters, who died seised of considerable land, and who provided in his will for his widow, his two daughters, and his four sons. Appellant's arguments are concerned chiefly with a portion of the eighth paragraph of the will, which devised the 200 described acres of land to appellant, subject to certain payments to the widow and subject to the payment of his defined share of the indebtedness on another quarter section of land if the testator should not have paid that indebtedness. The payments are not the subject of controversy. The argument centers about two things: First, the legal effect of the following words contained in the eighth paragraph of the will—"I also direct that said land herein devised to my said son, John Hilliard Peters, shall not be sold, nor incumbered by trust deed, mortgage or otherwise prior to the year 1925;" and, second, the acts and conduct of the plaintiff after he was vested with title under the will.

For a better understanding of the issues, it is well to state here certain other facts fully pleaded and indicated in the evidence.

Appellant was probably born December 7, 1890. His father's will was executed October 28, 1914, and his father died in February, 1915. Appellant was then living on and farming the land in question and continued to live there until about March 1, 1922, when he moved to Omaha, where he has since worked as a traveling salesman. From his majority he did business with the Stanton National Bank, borrowing comparatively small sums of money. After he acquired the land under his father's will his borrowings greatly increased until, on October 30, 1920, he

owed the bank $35,467.98 on unsecured notes, some of which were then due and payable. On that date appellant and his wife, Kate Peters, entered into a written agreement, duly acknowledged, with Frank L. Sanders, acting for the bank and for the use and benefit of the Stanton National Bank, in consideration of the renewal of the notes, to execute a collateral promissory note for $36,000, together with a mortgage securing the same upon the real estate owned by John Hilliard Peters and Kate Peters. It was agreed therein that the collateral note and mortgage should be security for the said indebtedness and for payment of all interest accruing thereon; that Peters and wife warranted and guaranteed the title to the real estate and to cure at their own expense any defects in title to the premises mortgaged.

On the same day appellant executed and delivered to Frank L. Sanders the collateral note and mortgage for $36,000. It covered the 200 acres devised under the will and also an undivided one-half interest in 292.28 acres owned jointly by appellant and another. The latter tract was mortgaged expressly subject to two mortgages already existing thereon. The principal notes in favor of the bank were renewed in 1921. Appellant was unable to pay them.

On October 5, 1921, in order to aid in making effectual the warranty and guaranty as to the 200 acres, and also to convey the land to the bank through its nominee, appellant and his wife joined all the other heirs (and their respective spouses) of John Peters in a warranty deed to the 200 acres in favor of Andrew Spence. Mr. Spence had become the president of the Stanton National Bank in place of Frank L. Sanders and was acting for the bank. The land was taken over absolutely on the basis of $40,000 or $200 an acre. As a consideration for the settlement, the bank released its mortgage as to the 292.28 acres, paid $1,200 to third parties on account of a mortgage, took over appellant's $200 stock in a Hi-line Company, and assumed the taxes on the land. As a part of the transaction it surrendered the principal notes of appellant, and on October 11, 1921, canceled the collateral note and mort-

gage. Under the settlement appellant was to vacate the premises on March 1, 1922, and Spence was to take possession on that date. This was done.

While Spence held the title for the bank he mortgaged the land to the Northwestern Mutual Life Insurance Company, appellee herein, for $12,500. On March 16, 1923, Spence conveyed the land to the Stanton National Bank, and on March 1, 1925, the bank conveyed by warranty deed to William F. Schulz, appellee, who has ever since lived on the land with his wife and three children and who has made valuable improvements thereon. He paid the bank a consideration of $40,000, being $14,000 in first mortgages on Stanton county farm land, $13,500 in town property in Stanton, and $12,500 represented by the mortgage on the land.

The petition was filed March 31, 1927. The Stanton National Bank was not made a party. The Northwestern Mutual Life Insurance Company and William F. Schulz and wife were the only defendants named. Plaintiff sought to quiet title against them on the ground, in substance and effect, that he became the owner of the fee simple title through his father's will, and that the rights of the defendants were acquired prior to 1925, in violation of the terms of the will restricting alienation; that it was the intention of the testator to create a constructive spendthrift trust, and that the defendants, having notice of the restriction, acquired no interest in the land through the conveyances under which they claim.

The insurance company set up its mortgage, and the defendants Schulz set up their title by mesne conveyances from plaintiff through the bank and the officers of the bank acting for it, showing the history of the acts and representations of plaintiff in relation to the whole matter. They pleaded that, when Spence took a deed on behalf of the bank, plaintiff insisted that, notwithstanding the terms of his father's will, he had a fee simple title with the power of alienation, agreed to get all others who might have an interest in any reversion to convey, and agreed to warrant the title if they would take it and release him

from the debts owed the bank and assume the certain other obligations heretofore named. Relying thereon the bank canceled his debts, assumed the obligations, and accepted title buttressed by the warranties and conveyances from plaintiff and his wife and all the other heirs and their spouses; and the defendant Schulz made many improvements, at considerable expense, detailed in his pleadings, while the plaintiff stood by and waited until he became insolvent and could not make good his warranties and guaranties nor respond in personal damages, until his debts to the bank had become barred, and until more than two years after the first of the year 1925, before asserting the alleged infirmity of title. Wherefore they claim he is estopped by his conduct and barred by his laches from maintaining this suit.

It appears that, on March 12, 1927, plaintiff and wife, for an expressed consideration of $25,000, mortgaged the 200 acres to Thomas E. Conley and R. B. Hasselquist (who are his attorneys in the suit). This mortgage was filed March 31, 1927, the same day the petition was filed, but Conley and Hasselquist were not made parties. Somewhere along the line they were included as defendants, as they joined plaintiff in a pleading filed November 26, 1927, and their rights are adjudicated adversely to them in the decree entered October 12, 1928. Likewise, on March 26, 1927, plaintiff and wife mortgaged the 200 acres to Donald Matheson for $6,250. This was filed March 31, 1927, and he joined plaintiff and his attorneys in the pleading above referred to and was cut out by the decree. Conley, Hasselquist and Matheson have not appealed.

There is little, if any, dispute about the facts. The salient facts were rightly found by the trial court in favor of defendants. The result is dependent on matters of law. The issues of law arising out of the facts may be condensed as follows:

First. Appellant asserts and appellees dispute that the restraint of alienation of the fee as provided by the will is valid.

Second. Even if that restraint of alienation is held to

be valid according to its terms, yet appellees contend and appellant denies that the conduct of appellant was such that estoppel and his laches are a complete defense against his suit in equity.

Section 5594, Comp. St. 1922, requires that, in the construction of a will, it shall be our duty "to carry into effect the true intent of the parties, so far as such intent can be collected from the whole instrument, and so far as such intent is consistent with the rules of law."

When the will was made in October, 1914, we do not find that there was anything in the evidence to indicate that the testator had so short an expectancy of life that it would end, as it did, in his death in February, 1915; nor do we find evidence that the plaintiff was a spendthrift and that his father intended to create a spendthrift trust. Plaintiff's later financial condition probably arose in his case, as it did in many others of the period, in the purchase of other lands and in the deflation of value of lands and of farm products. So the question of the intent and of the right of the testator to restrict alienation is unvexed by any facts other than those discoverable from the will itself.

Counsel have not pointed out, nor do we find a case in our own court, where a fee simple title with a restraint for a definite time, but ending within the life of the devisee, as in the case at bar, has been the subject of an opinion, though several of our cases have been discussed in the briefs as if they were definitely in point. In *Albin v. Parmele*, 70 Neb. 740, the will expressly provided, as to the devisee: "The intention being to give him a life estate therein without the power to sell or dispose of it." The remainder in fee was held to belong to the heirs of the devisee, as appeared from the full contents of the will, interpreted in the light of the intent statute. *Weller v. Noffsinger*, 57 Neb. 455, involved a trust estate which was to continue until the beneficiary should arrive at the age of 30. The beneficiary had not arrived at that age. The court held that the legal title was in the trustee and his creditors took no title by virtue of their execution. In *Hiles v. Benton*, 111 Neb. 557, the will, the intent of which

was there sought, expressly devised a "life use," and then said: "That there may be no mistake or misunderstanding as to my intention and purpose, I here state that it is my purpose and intention that my son, Harry Hiles, shall have the use of my real estate during his life, without power and authority to sell, mortgage, or to in any manner alienate said use for any purpose." It was held that the intent of the testator was to place the life use of the property beyond the reach of the creditors of the devisee of that life use. *Reuter v. Reuter,* 116 Neb. 428, involved a deed, conveying a life estate, with conditions against incumbrances, with a remainder in fee to a designated class.

However, there are, in some of the foregoing cases and in others in our court, many indications of the relaxation of ancient rules of construction of wills and deeds brought about by the statute requiring the intent of the testator or grantor to be followed when such intent is consistent with the rules of law.

One of the most recent cases expressing the governing principle compelled by section 5594, Comp. St. 1922, is *In re Estate of Combs,* 117 Neb. 257 (citing cases), in which we said: "No rule of law is better settled or more in accord with good sense than that which requires the intention of the testator to be ascertained from a liberal interpretation and comprehensive view of all the provisions of the will. No particular words, no conventional forms of expression, are necessary to make an effective testamentary disposition of his property. The court, without much regard to the canons of construction, will place itself in the position of the testator, ascertain his will, and, if lawful, enforce it."

There is no doubt that the ancient rule against restrictions of alienation of a fee simple title has been much relaxed by the modern trend of interpretation of wills and deeds; and, under a statute such as ours, the intent of the testator is the imperative guide unless inconsistent with the rules of law. In *Hiles v. Benton,* 111 Neb. 557, Judge Redick is quoted with approval as saying: "It occurs to me that the rule of law here spoken of does not include

legal rules of construction in conflict with the very rule of construction sought to be established by the statute, for this would be a *felo de se.*"

In *Libby v. Clark,* 118 U. S. 250, an ejectment action from Kansas, Libby claimed under a patent issued to Hurr, an Ottawa Indian, granting him and his heirs 320 acres of land duly allotted to him as an Indian of the Ottawa tribe, pursuant to the terms of a treaty ratified July 28, 1862. The treaty provided that no Indian grantee should alienate or incumber the land allotted to him until he should, by the terms of the treaty, become a citizen of the United States, and further provided that such allottees should become citizens five years after the ratification. The deed from Hurr to Kallock, under which Libby claimed, was dated December 1, 1865. It was refused in evidence because more than two years of the period before Hurr could become a citizen under the treaty yet remained and there was no accompanying evidence that he was otherwise a citizen. On the point that the patent to Hurr conveyed a fee simple title with a restraint on alienation, Mr. Justice Miller, who wrote the opinion, said: "The title conveyed to Hurr by the patent was a *fee simple;* that is it was all the title or interest in the land. No one shared this title, or had any interest in it, and it descended, or would have descended, to his heirs. The restriction on his right to convey did not deprive the title of the character of a fee simple estate. * * * The limitation of the power of sale for five years is not inconsistent with a fee simple estate."

"A condition, that the grantee shall not alien to a particular individual, or for a limited time, or that he shall not use it for a specified purpose, or in a prescribed manner for a limited time, has always been held valid." *Cornelius v. Ivins,* 26 N. J. Law, 376, 385.

Such restraints upon alienation of a fee simple title "as are limited and reasonable in their application, and as to the time they must operate, are valid and will be upheld. 1 Washburn on Real Property, 67-69; 4 Kent Com. 135." *Munroe v. Hall,* 97 N. Car. 206.

A condition in a will, devising land to an infant, that it shall not be sold until he is 35 years of age, is not an unreasonable restraint of alienation and is valid. Many cases cited. *Wallace v. Smith,* 113 Ky. 263.

Other cases to the same effect: *Jauretche v. Proctor,* 48 Pa. St. 466; *Camp v. Cleary,* 76 Va. 140; *Langdon v. Ingram's Guardian,* 28 Ind. 360; *Andrews v. Spurlin,* 35 Ind. 262.

Each case of the interpretation of intent of a testator or grantor must be considered and determined in the light of its own facts. Taking into consideration the circumstances surrounding the testator, and giving active life and force to the statute on intent, we are of the opinion that, in this particular instance, the will devised to appellant a fee simple title to the 200 acres, with a lawful restraint upon his alienation thereof until the year 1925.

This leaves for consideration the question whether, when Peters brought this suit in equity, he was in a position to maintain such a suit. We have shown that he did not file his petition until March 31, 1927. He therefore did not commence the suit until two years and three months after the date of removal of the restriction of alienation imposed by his father's will. It was not until three months after the restriction had expired that appellee Schulz completed his deal and payment for the farm and went into possession. He continued in undisputed possession and ownership of the farm for two years before Peters asserted any right or title against him. In the meantime he had not only made valuable improvements, as heretofore stated, but the evidence shows that Peters had come to the place and asked permission to drive through one of the fields because the road was blocked by snow. He conversed with Schulz and his son about certain buildings on the farm, but neither then nor at any other time claimed any ownership of or interest in the place. Schulz had bought and paid for the place, had made improvements thereon and lived there for two years relying on the title. That title had come from appellant and was buttressed by deeds with covenants of warranty, not only from appellant, but from his brothers and sisters.

Full and complete consideration had been paid to appellant for the land. Appellant's only claim of justification for his position is that he was restrained by the terms of his father's will from conveying the land and that his deed made prior to 1925 was void. Was it void or was it, at the most, merely voidable?

Even, "Upon the breach or nonperformance of a condition annexed to the grant of a freehold estate, the title conveyed is not void, but is only voidable by the act of the grantor or his heir, who must take advantage of the condition and repossess himself of the estate by actual reentry, or by some act equivalent thereto and manifesting an intent to terminate the estate." 18 C. J. 381, sec. 442. And "Equity may relieve from forfeiture in case of breach of conditions in deeds, as in case of other penalties, and will adapt the relief to the nature of the case, but the granting of relief rests in the sound discretion of the court." 18 C. J. 381, sec. 440.

In the will there was no reversion expressed. There was no penalty provided. Appellant has proceeded on the theory that a reversion was implied in his favor and that his deed was void. But it would seem as if the deed was, at the most, voidable only, and that equity reserves to the court the usual discretion to dispense equity only to those who do equity.

"A provision in a deed of gift from father to son that the vendee shall not convey the property to any person other than the father's bodily heirs for the term of twenty years is a reasonable restriction upon alienation. A conveyance made in violation of such restriction is merely voidable and not void. Such forfeitures may not be exacted after the expiration of the restrictive period." *Francis v. Big Sandy Co.*, 171 Ky. 209.

To the same effect is *Price v. Virginia Iron, Coal & Coke Co.*, 171 Ky. 523. See, also, the learned discussion in *Kentland Coal & Coke Co. v. Keen,* 168 Ky. 836, holding that, where one has made a conveyance in violation of a restriction, that is, before the restrictive period has elapsed, and the right to proceed for a forfeiture is relied

on, "this right must be exercised during the time through which the prohibitive time is imposed by the condition, and if this right is not exercised by such person or persons within such time, the deed made in violation of the condition becomes absolute, as such deeds are voidable and not void."

We are of the opinion that the most appellant can claim as against his mortgage and contract of October 30, 1920, and as against his deed of October 5, 1921, is that, being made before the end of the restrictive period, they were merely voidable, and not void. They contained the usual covenants of warranty. If it had not been for the limited restraint upon alienation imposed by his father's will, any title that thereafter came to grantor would have inured to the benefit of his grantees under the well-known rule which needs no citation of authorities.

When he executed and delivered these instruments the appellant knew that the restraint was operative and he knew that it would so continue until the year 1925. He intended, as shown by his personal acts in taking the most ample consideration to himself and in securing the waiver by deeds of his coheirs and devisees of any reversion of title to them, to make finally effective as of January 1, 1925, his conveyance of title. Not having acted then on what he now claims was a continuing right of forfeiture after that date, he allowed the appellee Schulz to take over and pay a full and complete consideration for the land as of March 1, 1925, and more than two years thereafter he seeks to exact the forfeiture.

We think his position untenable. He asks equity but does not offer to do equity. We do not go to the length of some of the cases we have cited and say that his upset date within which he could maintain his suit would be the last day of the period of restraint. It may be that in such a case of restraint upon alienation there might be good reason to prevail upon action taken within the usual period of limitations. Each case must be determined in the light of its own circumstances. We are of the opinion that, in the particular circumstances of this case, the appellant, by

his mortgage, contract, deed and conduct, allowed the appellee Schulz to become placed in a situation where it would be inequitable to divest him of his title. It is unnecessary to repeat the facts which are so apparent. So long after the expiration of the period within which appellant might have asserted his lack of power but continued to waive action to assert it, equity will not lend its aid to restore him to a place of vantage and to displace therefrom one who would not have been there but for the acts and conduct of the appellant. Whether it be called estoppel or laches is immaterial. The important thing is that the facts and the law applicable thereto prevent the appellant from recovering as a matter of equity and good conscience.

The judgment of the district court is

AFFIRMED.

STANLEY V. CARR ET AL., APPELLANTS, V. CLARK H. FENSTERMACHER ET AL., APPELLEES.

FILED DECEMBER 10, 1929. No. 26706.

1. **Municipal Corporations: POWERS: METHOD OF EXERCISING.** Where the legislature grants a municipal power and prescribes exclusive methods of exercising it, the municipality must follow those methods.
2. ———: ———: ———. A grant of power to a city may imply a means of exercising it in addition to statutory methods without restriction as to others.
3. ———: LIGHTING UTILITY: METHOD OF PAYMENT. In cities of the second class the cost of a municipal lighting utility may be defrayed by means of a tax levy and, if insufficient for that purpose, by a bond issue. Comp. St. 1922, sec. 4397.
4. ———: ———: ———. Where a city of the second class has on hand sufficient available money to pay the purchase price of a municipal lighting utility, resort to a tax levy or to a bond issue for that purpose may be unnecessary, such methods, though authorized by statute, not being exclusive.
5. ———: ———: ———. The word "may" in the statute authorizing a city of the second class to defray the cost of a municipal lighting plant by means of a tax levy or a bond issue does not necessarily mean "shall" or exclude other methods.

6. ———: ULTRA VIRES CONTRACTS. Contracts beyond the power of a municipality are such as it cannot lawfully enter into for any purpose.

7. ———: LIGHTING UTILITY: METHOD OF PAYMENT. Power of a city to install and maintain a municipal lighting plant by means of a tax levy or a bond issue may, for such purposes, imply power to make a cash payment from funds already on hand and to pay the remainder of the purchase price out of net earnings of the plant, the two methods first mentioned not being exclusive.

8. ———: ———: CONDITIONAL OBLIGATION. In a city charter a provision requiring an appropriation in advance of incurring an indebtedness may not apply to a conditional obligation payable alone out of funds on hand and net earnings of a municipal lighting plant.

9. ———: ———: ESTIMATED COST. Failure of a city engineer to state a definite amount as the estimated cost of particularly described equipment for a municipal lighting utility, instead of "costs not to exceed" a particular sum named, *held* a mere irregularity not invalidating a subsequent contract of purchase.

10. ———: ———: NOTICE TO BIDDERS. In a notice to bidders, failure of a city to state the hour for closing and opening bids as provided by statute, instead of requiring bids "on or before" a specific date named, *held* not to invalidate a subsequent contract of purchase, where the information necessary to proper bidding was given and one bid only was submitted.

11. ———: ELECTRICITY: RATES. The duty of a city to fix reasonable rates for electricity furnished to consumers through a municipal lighting plant *held* not violated by a contract to purchase necessary equipment for it and to pay a portion of the purchase price out of its net earnings, where the contracting parties agreed that such earnings should be based alone on lawful charges.

APPEAL from the district court for Custer county: BRUNO O. HOSTETLER, JUDGE. *Affirmed.*

Squires, Johnson & Johnson and *Sullivan & Wilson,* for appellants.

Dressler & Neely and *Perry, Van Pelt & Marti* and *N. T. Gadd, contra.*

Paul E. Boslaugh, Thomas J. Keenan and *Grady Corbitt, amici curiæ.*

Heard before GOSS, C. J., ROSE, DEAN, GOOD, THOMPSON, and EBERLY, JJ., and REDICK, District Judge.

ROSE, J.

This is a suit in equity to decree the invalidity of an ordinance authorizing the city of Sargent to buy a Diesel engine and other equipment for the improvement of an electric light and power plant already in operation and to enjoin the municipal officers and the seller of the equipment from performing a contract of purchase into which they entered. Plaintiffs are Stanley V. Carr and Edward Williams, who plead that they are resident taxpayers and users of electricity furnished by means of the plant; that the city was without power to enact the ordinance or to enter into the contract of purchase; that the municipal officers did not follow the statutory methods of procedure; and that the ordinance and contract of purchase are void. In the petition the ordinance, the contract, and other facts upon which plaintiffs rely for an injunction are pleaded at great length. Regularity of the municipal proceedings, validity of the contract of purchase and other grounds of defense are fully pleaded in the answer of defendants. Upon a trial of the issues the district court dismissed the suit and plaintiffs appealed.

The validity of the contract is vigorously assailed on the ground that the only legal way to purchase the equipment was to raise the necessary funds by taxation or by means of a bond issue authorized by a vote of the people, neither step having been taken. Those methods are authorized by the city charter and it is argued that they are exclusive. Comp. St. 1922, secs. 4396-4399. The city was operating an electric light and power plant at the time the Diesel engine was purchased. The new equipment was procured in the following manner: The council enacted and the mayor approved an ordinance declaring the old equipment to be inadequate, authorizing the purchase, directing notice for bids, and providing for payment of the purchase price out of the net receipts from the operation of the plant and not out of any funds raised by taxation, notice to bidders so specifying. The ordinance

provided further that the unpaid indebtedness incurred should be evidenced by conditional warrants payable out of the net receipts from the operation of the plant and that the warrants should not be general obligations of the city nor payable by taxation. The notice to bidders described the Diesel engine and the other necessary equipment desired and recited that the city engineer's estimate of the cost would be approximately $16,500. Fairbanks, Morse & Company, defendant, made the only bid—$15,435. It was accepted. From funds on hand the city paid $3,000 and for the remainder, or $12,435, issued conditional warrants payable only from net earnings of the plant. The contract of purchase and the conditional warrants conformed generally to the terms of the ordinance. The sellers of the new equipment reserved the right to retain title thereto pending nonpayment of any part of the purchase price. The decree denying an injunction was not superseded. The new equipment was installed and the city continued to operate the plant as improved.

Plaintiffs argued that the statutory methods of raising funds by means of taxation or by a bond issue excluded every other method, and that consequently the ordinance, the contract of purchase and the conditional warrants were void. The charter of Sargent shows that the two methods indicated were authorized by statute. Comp. St. 1922, secs. 4397-4399. The statutory procedure must of course be followed where the specific methods of raising money are adopted. It is shown by the record that no attempt to raise funds by taxation or by a bond issue was contemplated or made. Both methods were specifically rejected by ordinance, contract and conditional warrant. It does not necessarily follow, however, that power to raise money to pay for the utility or the improvement thereof by other means was excluded by the legislative grant. The legislation does not contain exclusive terms. A grant of power to a city may imply a means of exercising it in addition to specific statutory methods without restriction as to others. In direct language cities of the class to which Sargent belongs are specifically empowered in a single

section of the charter "to purchase, construct, maintain and improve" a lighting system. Comp. St. 1922, sec. 4396. The section next following provides that the cost of such a utility "may" be defrayed by means of a tax levy and, if insufficient for the purpose, by a bond issue. The word "may," in the sense used, does not necessarily mean "shall." If the city has on hand sufficient available money for that purpose resort to a tax levy or a bond issue is unnecessary. *Christensen v. City of Fremont*, 45 Neb. 160. On precedent the power to raise funds for a lighting plant by the methods mentioned in the statute is not exclusive. Contracts beyond the power of a municipality are such as it cannot lawfully enter into for any purpose. *Stickel Lumber Co. v. City of Kearney*, 103 Neb. 636. In the present instance the city of Sargent had $3,000 available for the initial payment. Under the contract payment of the remainder of the purchase price, $12,435, cannot be enforced by means of a bond issue or a tax levy. The seller of the new equipment and the holders of conditional warrants are limited to collection of deferred payments out of net earnings of the plant. By the very terms of the contract of sale individual property owned by residents of Sargent cannot be taxed to pay any part of the purchase price. The evidence shows that the new equipment was needed to make the plant efficient. There is nothing in the record to show extravagance, fraud or official corruption in the municipal proceedings. Performance of the contract according to its terms will not result in the taxation of any property owned by plaintiffs. The city had power in some form to make the purchase. The method adopted was not specifically prohibited by law and does not seem to be illegal. The power to pay for or improve a lighting utility with available money on hand or with net earnings of the plant is implied by the general grant. A general liability of the city was not created. Under the circumstances, therefore, want of power and alleged illegality in the respect indicated are not sufficient grounds for granting an injunction.

Plaintiffs argue further that the purchase is void be-

cause the annual appropriation bill did not contain an estimate of the expenditure as required by statute. Comp. St. 1922, sec. 4373. A formal appropriation in advance was unnecessary in the present instance, since funds to meet the expenditure are not to be raised by taxation, the obligation being payable alone out of funds on hand and net earnings of the plant and not being a general indebtedness of the city. *State v. Martin*, 27 Neb. 441; *Moore v. City of Central City*, 118 Neb. 326; *Slocum v. City of North Platte*, 192 Fed. 252.

Another point urged as a ground for an injunction is that the contract is void for want of a city engineer's previous estimate of cost. Such an estimate seems to be required by law where the expenditure exceeds $500. Laws 1925, ch. 51. The engineer did in fact submit what was treated by the city and the bidder as an estimate, but it is condemned by plaintiffs as "no estimate at all." It described the Diesel engine and the other equipment desired, and concluded: "Costs not to exceed $16,500." The statute did not prescribe a form for an estimate. The failure of the engineer to state a definite amount instead of the maximum cost was an irregularity at most. It served the statutory purpose of an estimate. No one was misled, deceived or wronged by it. The bid was lower than the sum stated by the engineer and there is nothing to show that the purchase price was excessive. The irregularity is not a ground for an injunction.

Failure of the city in its notice to bidders to state the hour for closing and opening bids is also urged as a ground for equitable relief. The advertisement required bids "on or before the 7th day of May, 1928." The rule in absence of a statute prescribing a particular form is that harmless informalities do not vitiate the notice for bids where the information necessary to proper bidding is given. There was a substantial compliance with the statute in respect to notice and the irregularities challenged are not fatal defects entitling plaintiffs to an injunction. There was only one bid for the Diesel engine and no one was injured by the omission.

Plaintiffs contend further that the contract to pay for the equipment out of the net earnings of the electric light and power plant will prevent the mayor and council from performing their duty to fix reasonable rates for electrical currents. The ordinance and the contract limit the sellers of the equipment and the holders of the conditional warrants to net earnings based on lawful charges for light and power. The point does not seem to be well taken.

On the whole case the conclusion is that the suit was properly dismissed.

AFFIRMED.

Good and Thompson, JJ., dissent.

H. BORSKY, APPELLEE, V. NATIONAL FIRE INSURANCE COMPANY, APPELLANT.

FILED DECEMBER 10, 1929. No. 26873.

1. Insurance: POLICY: CONSTRUCTION. Where a fire insurance policy contains a provision that insurer shall not be liable for loss while the insured automobile is being rented under contract or leased, and during the life of the policy the car is destroyed by fire while it is being operated by a lessee who has leased the car under contract, there can be no recovery.
2. ———: ACTION ON POLICY: DIRECTION OF VERDICT. In an action on a fire insurance policy, where the record discloses that at the time of loss by fire the policy was suspended and not in force, it is error to refuse to direct a verdict for the insurer.

APPEAL from the district court for Douglas county: CHARLES LESLIE, JUDGE. *Reversed and dismissed.*

Rose, Wells, Martin & Lane, for appellant.

Howell, Tunison & Joyner, Kennedy, Holland, De Lacy & McLaughlin, contra.

Heard before GOSS, C. J., GOOD, THOMPSON, EBERLY and DAY, JJ., and FOSTER and SHEPHERD, District Judges.

GOOD, J.

From an adverse judgment in an action on a policy of fire insurance, defendant appeals.

The policy covered an automobile which was destroyed by fire during the life of the policy. One of the several defenses pleaded and relied on is that, under the terms of the policy, the automobile was not covered by the policy at the time of the fire, because it was being used as a leased or rented car.

The policy contains the following clause: "Unless otherwise provided by agreement in writing added hereto, this company shall not be liable for loss or damage to any property insured hereunder: * * * (b) while the automobile described herein is * * * being rented under contract or leased."

From the record it appears that plaintiff bought and kept the car for his individual use, and it was stipulated in the policy that it was to be used only for private and pleasure purposes. Plaintiff also owned and operated a public garage and taxicab and "drive-it-yourself" business. In the evening on which the car was destroyed, plaintiff's foreman, in violation of his instructions, leased the car in question to a colored boy for his private use, and the latter, with a number of companions, was using the car in a "joy ride," when it upset, took fire and was practically destroyed.

Defendant urges that the trial court erred in not directing a verdict for defendant; in refusing to sustain a motion for judgment notwithstanding the verdict; and that the judgment is not sustained by the evidence.

No rider or written agreement was added or attached to the policy providing for coverage of the automobile while leased or rented. The question for determination is: Was the automobile, while leased, covered by the policy without such rider or written agreement?

Plaintiff argues that since the policy contains no specific forfeiture clause the court, by interpretation or construction, is powerless to incorporate one into the policy. He cites and relies on the opinion in *Hagelin v. Commonwealth Life Ins. Co.*, 106 Neb. 187, wherein it was held: "Where there is no specific provision in a policy of life insurance for forfeiture, either whole or partial, on a

breach of a condition by the assured, the court will not write one in; nor can the insurer afterwards impose new conditions creating a forfeiture without the consent of the assured, and without a new consideration."

We find no occasion to depart from nor to criticize the ruling above quoted, but we think it inapplicable to the instant case. In the *Hagelin* case the policy was issued on the life of Paul Hagelin and contained a provision: "But if at any time he engage in military or naval service in time of war (the militia not in active service excepted), he shall secure the company's written consent and pay the extra premium therefor." Hagelin became a soldier in the World war, and the company was advised of his military service. It did not cancel the policy. There was no provision in the policy for a forfeiture in case the assured did engage in military service, or for its suspension during such service; nor did the policy contain any provision as to the amount of additional premiums that might be due if assured engaged in such service. From a wound, inflicted while in the military service, Hagelin died. This court held that there was no forfeiture provided for his failure to pay the additional premium, whatever it might be, and that the company issuing the policy could not defeat a recovery under the circumstances. In the instant case, however, the automobile is not covered by the insurance policy while it is used as a leased or rented car. If the provision in the Hagelin policy had been that during the time Hagelin was engaged in military service the policy should not be operative or effective, then we would have a similar situation. The record discloses that the premium, in the instant case, paid for a $1,600 policy of fire insurance was $6.90, and it also discloses that the regular premium rate for insurance upon cars leased or rented is $8 per $100 higher, or more than 20 times the amount that was paid in this instance. The policy, itself, clearly provides that during the time the car is being used as a leased or rented car it is not covered by the policy. There is no forfeiture, but simply a suspension of coverage while the car is being leased or rented. While the exact question

has not been hitherto before this court, we have decided analogous questions.

In *Houston v. Farmers & Merchants Ins. Co.*, 64 Neb. 138, it was held: "Where credit is extended and a note taken for the premium to be paid for a policy of insurance, and both the note and the insurance policy provide that in case the note is not paid at maturity the policy shall be suspended, inoperative and of no force or effect so long as the note or any part thereof remains due and unpaid, the insurance company cannot be held liable for a loss occurring after the maturity of the note and while the same is unpaid." Similar rulings have been announced in the following cases: *Phenix Ins. Co. v. Bachelder*, 32 Neb. 490; *Home Fire Ins. Co. v. Garbacz*, 48 Neb. 827; *Antes v. State Ins. Co.*, 61 Neb. 55; *Farmers Mutual Ins. Co. v. Kinney*, 64 Neb. 808; *Hooker v. Continental Ins. Co.*, 69 Neb. 754; *Nimic v. Security Mutual Hail Ins. Co.*, 84 Neb. 403; *Belk v. Capital Fire Ins. Co.*, 102 Neb. 702; *Dressler v. Commonwealth Life Ins. Co.*, 105 Neb. 669.

In each of the cases cited above it is apparent that the stipulation provided for in the policy amounted to a suspension of the policy during the time of default in premium payment. The same principle, applied to the instant case, suspends the policy during the time that the automobile therein insured is being used as a rented or leased car. Insurance companies are permitted to select the kind of risks against which they will insure, and may also select the kind of risks against which they decline to insure. It is entirely within their discretion whether they will insure cars while being used in racing meets, or rented or leased, to be driven by the lessee. An insurance company may properly refuse to insure an automobile while it is being used for carrying highly inflammable or explosive material, and may, by contract, provide that if an automobile, covered by the policy, is so used during its life it will be suspended during such use. It is conceded that at the time of its destruction the car in question was leased or rented, and that while it was being so used by the lessee and through the latter's carelessness the car was upset, resulting in a fire and its prac-

tically total destruction. Under its terms, the policy was suspended while the car was being used by the lessee as a rented or leased car.

The learned trial court erred in refusing to direct a verdict for defendant and in not sustaining its motion for a judgment notwithstanding the verdict. The conclusion we have reached renders it unnecessary to discuss other assignments of error.

The judgment of the district court is reversed, and the action dismissed.

REVERSED AND DISMISSED.

THEODORE H. PHILLIPS, APPELLEE, V. CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY, APPELLANT.

FILED DECEMBER 10, 1929. No. 26835.

1. **Master and Servant: NEGLIGENCE: APPLIANCES.** The selection by an employer of one simple tool, easily understood and comprehended, suitable for the work and not demonstrated and recognized of itself to be dangerous, rather than some other tool, is not negligence. The pick, commonly used by track-men on railroads, is such a simple tool, and failure to replace it with tie tongs to handle ties is not negligence.
2. ———: ———: ———. The rule requiring an employer to exercise ordinary care to provide reasonably safe tools for his employee has little application to simple ones, in common use, easily understood and comprehended, and in which defects can be readily ascertained by persons of ordinary intelligence.
3. ———: ———: ———. In the selection of tools, the employer is given much freedom of choice, and in the exercise of this discretion must use reasonable care and ordinary prudence.
4. ———: ———: DIRECTION OF VERDICT. Where, as in this case, there is no evidence of negligence, the trial court should direct a verdict.

APPEAL from the district court for Holt county: ROBERT R. DICKSON, JUDGE. *Reversed and dismissed.*

Byron Clark, Jesse L. Root, J. W. Weingarten and *Julius D. Cronin,* for appellant.

M. F. Harrington and *George M. Harrington, contra.*

Heard before GOSS, C. J., ROSE, DEAN, GOOD, THOMPSON, EBERLY and DAY, JJ.

DAY, J.

This action was brought under the federal employers' liability act, by one Phillips, to recover damages for an injury received while employed as a section foreman by the Chicago, Burlington & Quincy Railroad Company. The plaintiff recovered a verdict in the lower court, from which the defendant appeals. It is not questioned that this case is controlled by the federal employers' liability act, under which it is brought. Phillips, while employed as above stated, was injured in taking out and replacing a tie in the roadbed of the company. In the performance of this task, he received the injury for which he seeks to recover damages. The company provided, as a tool, a common pick, and while engaged in removing ties from the roadbed the pick slipped out of the tie, and he tumbled over the embankment and struck a snag, which entered his rectum, seriously injuring him.

In a case brought under the federal employers' liability act for damages, there can be no recovery against the employer, unless some act of negligence on the part of the employer be alleged and proved. *Chesapeake & Ohio R. Co. v. Stapleton,* 278 U. S. 585. In the words of that opinion: "The language of the federal employers' liability act shows unmistakably that the basis of recovery is negligence and that without such negligence no right of action is given under this act. *New York Central R. Co. v. Winfield,* 244 U. S. 147; *Erie R. Co. v. Winfield,* 244 U. S. 170." This court has followed this rule laid down by the federal court in numerous cases, notable among which is the case of *Nanfito v. Chicago, B. & Q. R. Co.,* 103 Neb. 577, in which case it is written: "It seems that the federal courts have so construed this act that there is no liability thereunder without proof of negligence of the defendant which was the proximate cause of the injury complained of"—citing *Missouri, K. & T. R. Co. v. Foreman,* 174 Fed. 377; *Seaboard Air Line Railway v. Horton,* 233 U. S. 492.

Since the federal employers' liability act does not contain a definition of negligence, we must determine whether or not negligence exists in this case from the common law, as interpreted and applied in the federal courts, if that interpretation differs from that in the state courts. *New Orleans & N. E. R. Co. v. Harris*, 247 U. S. 367. We cite only a few of the cases upon this question as a basis for discussion of the questions involved in this case. This proposition has been so frequently discussed by the federal courts and this court, and the holdings have so consistently followed without deviation in every case the rule above set out, that we need not labor further with it here.

The question squarely before this court for its determination in this case is whether or not the defendant was negligent in its failure to furnish tie tongs instead of picks for the use of its track-men in removing and replacing ties. The question involved in this case is not that of a defective tool, which was known to the employer to be defective, and was continued in use and the employee injured as a consequence. We must determine whether the furnishing of one tool for the work rather than another was such negligence as would sustain a verdict for the plaintiff. The employer is not bound to supply the best, the newest, or the safest tools to insure the safety of his employees. It is his duty to use all reasonable care and prudence for the safety of his employees, by providing them with machinery and tools reasonably safe and suitable for the use to which they are to be put. In *O'Neill v. Chicago, R. I. & P. R. Co.*, 66 Neb. 638, it was held, quoting from *Titus v. Bradford, B. & K. R. Co.*, 136 Pa. St. 618:

"Absolute safety is unattainable, and employers are not insurers. They are liable for the consequences, not of danger, but of negligence; and the unbending test of negligence in methods, machinery, and appliances is the ordinary usage of the business. No man is held by law to a higher degree of skill than the fair average of his profession or trade, and the standard of due care is the conduct of the average prudent man. The test of negligence

in employers is the same, and however strongly they may be convinced that there is a better or less dangerous way, no jury can be permitted to say that the usual and ordinary way, commonly adopted by those in the same business, is a negligent way, for which liability shall be imposed. Juries must necessarily determine the responsibility of individual conduct, but they cannot be allowed to set up a standard which shall, in effect, dictate the customs or control the business of the community."

It is the duty of the master to furnish his servant with reasonably safe tools. 39 C. J. 308. But—"The rule as to the duty of the master in furnishing the servant with safe tools and appliances does not apply to simple tools in common use and with which the master and servant are equally familiar." 39 C. J. 342. Where the tools or appliances furnished are of a simple nature, easily understood and comprehended, and in which defects can be readily ascertained by persons of ordinary intelligence, the foregoing rule has little application. *Vanderpool v. Partridge*, 79 Neb. 165. Again, in *Lynn v. Glucose Sugar Refining Co.*, 128 Ia. 501, it is said that the rule of law is well recognized that it is the duty of the master to use ordinary care in furnishing reasonably safe tools and appliances for his servants. It is only machinery and appliances which are recognized in their nature as dangerous to employees using them, to which the employer owes a duty to look out for their safety. The injury in this case was unusual and not to have been contemplated as a result of the plaintiff losing his balance and falling over when his pick slipped from the tie. The accident, and the consequent injury, was not occasioned by the dangerous character of the tool employed. The pick is a simple tool which has been in use for such purposes from the time the first railroad was built. It was suitable for the use which was made of it. To permit the jury to compare two tools as simple as the pick and tie tong, and to determine that one was safer than the other and that the failure to furnish the safer tool was negligence on the part of the employer, would be to permit the jury to determine the standard which should govern the duty

of the employer to the employee, and permit them to require the employer to compensate the employee, not because of its negligence, but rather because there was an accident, and as a result thereof the employee was injured. It was an unusual combination of circumstances contributing to the injury. A more unusual chain of circumstances leading to a more unusual injury could not be imagined. The pick slipped, the plaintiff stumbled and fell upon a snag, which struck him and entered his rectum, causing a serious injury. But a serious injury and an unfortunate result to the plaintiff, which is deplorable, cannot be the basis of recovery under the federal employers' liability act.

The plaintiff in this case relies upon the case of *Anderson v. Illinois C. R. Co.*, 109 Ia. 524, and *Chicago & N. W. R. Co. v. Bower*, 241 U. S. 470. In the former case, decided by the supreme court of Iowa in 1899, prior to the enactment of the federal employers' liability act, the plaintiff was required to do work which he was not accustomed to do, and in his seven years employment had not been required to do before. In that case the plaintiff was required to use a tool which was not suitable for the purpose, and which was so recognized. This does not describe the situation here. In the latter case, the court held that there was no question of attributing negligence to the employer for merely failing to install the latest and newest appliance, but that it was the question of not having the latest type of appliance in use, after its discovery and applicability had been demonstrated by experience, and perhaps under conditions little different from those which had obtained when in use before, in the face of notice that it was not reasonably safe and suitable. As applied to this case, it has not been proved that it had been demonstrated that a pick is not a reasonably safe and suitable appliance with which to remove and replace old ties in the railroad, and that the railroad company continued to use said tool, after it had been so demonstrated. This case does not come within the rule therein stated. In *Lynn v. Glucose Sugar Refining Co.*, 128 Ia. 501, the Iowa supreme court

pointed out perhaps more clearly the distinction between those cases and the case at bar. In that case, in order to recover for negligence for failure to furnish one tool for another, the court said, in substance, that it was not enough to establish the negligence of the employer to show that one tool might result in injury, and that the usual tool was different, but that it would be necessary that the evidence should go farther and prove a recognized danger in the use and employment of such as was not ordinarily in use for the purpose, in order to charge the defendant with negligence in permitting such use. "It is only machinery and appliances which are recognized as in their nature dangerous to employees using them, or working in proximity to them, as to which the employer owes a duty to the employee of looking out for his safety."

The federal courts have held that the employer has reasonable discretion in selecting facilities for the use of employees. It is the duty of the master to provide reasonably safe machinery or appliances for the servant to do the work. In making such provision, they are given much freedom of choice, and in the exercise thereof they must use reasonable care and ordinary prudence. *Toledo, St. L. & W. R. Co. v. Allen,* 276 U. S. 165; *Union P. R. Co. v. Marone,* 246 Fed. 916.

The pick which was used by the track-men in this case was not a tool which was recognized as dangerous in its use. It was a simple tool, ordinarily used for the purpose, and the failure of the railroad company to supply tie tongs in place thereof was not such negligence as would justify a recovery by the plaintiff under the federal employers' liability act, and the trial court should not have submitted the question of negligence to the jury. *Chicago, M. & St. P. R. Co. v. Coogan,* 271 U. S. 472.

While other questions are raised by the appellant's brief, their consideration here would be purely academic, since their discussion or determination is not necessary to a decision of this case, in view of the conclusion which we have reached with respect to the question of negligence. Since we have reached the conclusion that the failure of

the railroad company to furnish the parties with a tie tong instead of a pick for their work as track-men is not negligence to sustain a verdict under the federal employers' liability act, the judgment is reversed and the action dismissed.

REVERSED AND DISMISSED.

RALPH G. COAD, APPELLEE, V. LONDON ASSURANCE CORPORATION, APPELLANT.

FILED DECEMBER 12, 1929. No. 26968.

1. **Insurance**: POLICY: CONSTRUCTION. Where an insurance policy by its insuring clause clearly covers an article, and an exemption clause does not clearly exclude it, the policy, being strictly construed against the company preparing it, will be held to cover said article.
2. **Contracts**: CONSTRUCTION. The rule of construction applicable to contracts is that, where general words follow particular or specific terms, they are restricted in meaning to those articles which are of the same kind as those specially mentioned.

APPEAL from the district court for Douglas county: CHARLES E. FOSTER, JUDGE. *Affirmed.*

Ziegler & Dunn and *George W. Becker*, for appellant.

Ralph G. Coad, pro se.

Heard before GOSS, C. J., ROSE, DEAN, GOOD, THOMPSON, EBERLY and DAY, JJ.

DAY, J.

This was an action brought by Ralph G. Coad against the London Assurance Corporation to recover from the defendant under a fire insurance policy for a radio which was damaged by lightning. The case was first instituted in the municipal court of the city of Omaha, where the plaintiff recovered. It was appealed to the district court for Douglas county, where the court, a jury being waived, found against the defendant, whereupon an appeal was taken to this court.

The only question in this case is whether or not the plaintiff's radio was covered by the policy of insurance of the defendant. The defendant contends that the loss sustained was not covered by the policy because it was excluded by the lightning and electrical exemption clause of said policy. It is therefore obvious that the determination of this case depends upon a construction of the policy.

The insurance policy in this case is designated as the "Uniform Standard Nebraska and North Dakota Dwelling Policy," which the parties agree has been in use in this state for more than 25 years. In order to understand the question here presented, the insurance clause, so far as applicable, is set out, as follows: The company insures the plaintiff "against all direct loss or damage by fire and lightning, except as hereinafter provided, * * * on household * * * furniture and utensils, useful and ornamental (the property of assured and all members of the assured's family)," including, among other specially enumerated articles, "electrical apparatus, appliances and devices; scientific apparatus, appliances, devices and implements, and all other furniture and fixtures not belonging to and constituting a permanent part of the building." This insurance clause of the policy clearly includes the radio as being insured against fire and lightning. If the policy ended at this point, there would be no question but that the plaintiff would be entitled to recover for the loss of the radio. But the company contends that the radio is not covered because of the electrical exemption clause, which is as follows: "It is a special condition of this policy that the company shall not be liable for any loss or damage to dynamos, exciters, lamps, switches, motors and other electrical appliances or devices, caused by electrical currents, whether artificial or natural (including lightning), and will be liable (if covered by this policy) only for such loss or damage to them as may occur in consequence of fire outside of the machines, appliances or devices themselves." It will be noted that there is a difference in the language of the insurance clause and the exemption clause. In the exclusion clause, the words dynamos, exciters, lamps,

switches, and motors are used. These are specific and particular descriptions of articles to be excluded, and are followed by the general words: "And other electrical appliances or devices." The rule of construction applicable to contracts is that, where general words follow particular or specific terms, they are restricted in meaning to those articles which are of the same kind as those specially mentioned. *Hoffman v. Eastern Wisconsin R. & L. Co.*, 134 Wis. 603. It is not contended by the assurance company that a radio is named or included in any of the words of particular description, but it is claimed that it is included in the words, "and other electrical appliances or devices." A radio is not of the same kind as the particularly described articles and is not therefore included by the general words just quoted. Certainly, it is not clear that the radio is excluded by the electrical exemption clause. It is the general rule that the insurance policy should be construed strongly against the insurance company, because of the fact that it prepared the contract, rather than the insured, and had the time and opportunity to select with care and ingenuity, and with a view to its own interest, the language in which it was written. *Connecticut Fire Ins. Co. v. Jeary*, 60 Neb. 338; *Hass v. Mutual Life Ins. Co.*, 84 Neb. 682; *Riser v. Federal Life Ins. Co.*, 207 Ia. 1101; *Githens v. Great American Ins. Co.*, 201 Ia. 266, 44 A. L. R. 863. Therefore, since it is clear that the radio in question was included in the insurance clause, and it is not clear that it was one of the losses excluded by the electrical exemption clause of the policy, the policy ought to be construed against the assurance company as covering the radio. The judgment of the lower court is

AFFIRMED.

IN RE ESTATE OF THOMAS BAYER.
ANNA HAMILTON ET AL., APPELLANTS, V. ANTON M. BAYER ET AL., APPELLEES.

FILED DECEMBER 12, 1929. No. 27016.

1. Wills: TESTAMENTARY CAPACITY: PROOF. Where a will is contested upon the ground that, at the time of its execution, the testator was of unsound mind, the proponents having established a *prima facie* case that the testator was of sound mind, contestants must introduce sufficient evidence to support a contrary finding by the jury, and, unless the evidence is conflicting there is no disputed question of fact for the court to submit to the jury.
2. ———: ———. The evidence in this case examined, and *held* to establish, without conflicting testimony, that at the time the testator executed the will he knew the extent and character of his property, the natural objects of his bounty, and the purposes of his devises and bequests. This makes him mentally competent to make a will.
3. ———: CONTEST: UNDUE INFLUENCE: BURDEN OF PROOF. Where a will is contested because it is alleged that it was procured by undue influence, the burden is upon the contestants to establish by proof, or by fair inference to be drawn from facts proved, that there was undue influence, which induced the testator to dispose of his property contrary to his intention. In such a case, suspicion or supposition of undue influence is not sufficient either to require the submission of the question to the jury, or to sustain a verdict.
4. ———: ———: DIRECTION OF VERDICT. If in a case contesting a will on the ground of mental incompetency and undue influence, the evidence is insufficient to sustain a verdict upon either of these issues in favor of the contestants, the trial court should withdraw these issues from the jury and direct a verdict.

APPEAL from the district court for Kearney county: LEWIS H. BLACKLEDGE, JUDGE. *Reversed, with directions.*

Lewis C. Paulson, for appellants.

C. P. Anderbery and *King & Bracken, contra.*

Heard before GOSS, C. J., ROSE, DEAN, GOOD, THOMPSON, EBERLY and DAY, JJ.

DAY, J.

This is a proceeding which has for its object the allowance for probate of an instrument as the last will of Thomas Bayer, deceased. The county court allowed the instrument as the will, but upon appeal to the district court it was found not to be such will, which finding was reversed by this court *(In re Estate of Bayer,* 116 Neb. 670) and the cause was remanded for a new trial. The case is here again for review after a second trial in which the will was found not to be the last will and testament of the deceased. The widow and three children of deceased appear as proponents of said will, while three other children appear as contestants. Thomas Bayer died April 20, 1924, leaving a widow and seven children. The will in dispute was executed November 18, 1922. There is no question as to the proper execution of the will, but the contestants urge that when the will was made the deceased did not have sufficient mental capacity to make said will, and that it was the result of the exercise of undue influence. The proponents contend that the evidence is not sufficient to sustain the finding of the jury against the allowance of said instrument for probate, either as to lack of sufficient mental capacity, or upon the question of undue influence.

In this state the burden is upon the proponents of a will to prove, not only the execution of the will, but the capacity of the testator. In *Seebrock v. Fedawa,* 30 Neb. 424, it was said: "It is the duty of the proponents in the first instance to offer sufficient testimony of the capacity of the testator to make out a *prima facie* case." We are not prepared to say that, where the proponents prove the testator to have been capable of transacting ordinary business, he is required to go further in order to make a *prima facie* case of testamentary capacity. The proponents having established a *prima facie* case as to the testamentary capacity of the deceased, it is necessary, in order to defeat the will, that the contestants introduce sufficient evidence to overcome the presumption arising out of the *prima facie* case made by proponents. The burden of proof does not shift, but the burden of going ahead, as some authorities put it,

does. The rule above stated in *Seebrock v. Fedawa, supra,* is approved in the following authorities: *In re Estate of Kubat,* 109 Neb. 671; *Steinkuehler v. Wempner,* 169 Ind. 154, 15 L. R. A. n. s. 673; *In re Estate of Sweeney,* 94 Neb. 834. The question directly before us in this case is whether, upon the proponents having established a *prima facie* case, the contestants offered any evidence tending to prove mental incapacity sufficient to sustain the verdict of the jury. If the evidence relating to mental capacity to make a will is conflicting, the issues of fact are questions for the jury. *In re Estate of Kerr,* 117 Neb. 630. The defeated litigants in the contest of a will are not entitled to a trial *de novo* on appeal to the supreme court, but upon such appeal the issues of fact are determined by the sufficiency of the evidence to sustain the verdict. With this rule in mind, we have searched the record diligently to discover whether or not there was evidence to support the finding of the jury in this case. There is no evidence in the record that Thomas Bayer, deceased, was of unsound mind, either at the time of the execution of this will, at his death, or at any intervening time. Not only is there an absence of proof of testamentary incapacity; but, giving the testimony the construction most favorable to the contestants, their testimony seems to indicate that the deceased was of sound mind at all times from the execution of his will to his death. It shows that he knew the extent and character of his property, the natural objects of his bounty, and the purposes of his devises and bequests. This is sufficient to render him mentally competent to make a will. *In re Estate of Kubat,* 109 Neb. 671, citing and following *In re Estate of Laflin,* 108 Neb. 298.

We reached this conclusion without reference to, or consideration of, the evidence offered in rebuttal by the proponents for the will. It consists of the testimony of more than 20 of the prominent citizens of the town in which the deceased lived, who were personally acquainted and closely associated with him, and who testified that he was a man of sound mind, capable of attending to his business, and did attend to it, up almost to the day of his death. At

his death he was 92 years of age, and it was stipulated in the record that he was a "strong man physically, and that he was in good health up to the time he died." This court said at the time the case was here previously: "The trial court should have withdrawn the question of competency from the jury, the evidence in the record being wholly insufficient to sustain a finding in favor of the contestants on that issue." *In re Estate of Bayer,* 116 Neb. 670. It is now argued here that the evidence before the court at this time is different, although a large part of it was read from the evidence of the previous trial. We do not deem it necessary that we compare the records in the two cases, with a view to determine such question, but we have determined, solely from the record now before us, that the question of the testamentary competency of Thomas Bayer should have been withdrawn from the jury in this case, inasmuch as there is no conflicting evidence or disputed question of fact to be submitted to a jury upon this issue for their determination. *In re Estate of Kubat, supra; In re Estate of Kerr,* 117 Neb. 630.

The second question presented to us for our consideration is whether the purported will was executed as a result of undue influence. It is charged by the contestants that one of the proponents, a son of the deceased, exerted undue influence upon the testator, with the result that the instrument is not the last will and testament of the deceased. The burden of proving this contention is ordinarily upon the contestants, and competent proof is required that the said will was procured by undue influence in order to set it aside. *In re Estate of Dovey,* 101 Neb. 11. In *In re Estate of Wilson,* 114 Neb. 593, the rule is set out as follows: "Where it is alleged that the execution of a will was procured by undue influence, the burden is upon the party alleging it to establish that the testator was induced by improper means to dispose of his property differently from what he intended." The following cases are cited: *Seebrock v. Fedawa, supra; Boggs v. Boggs,* 62 Neb. 274; *In re Estate of Dovey,* 101 Neb. 11; *In re Estate of Fenstermacher,* 102 Neb. 560; *In re Estate of Kees,* 114 Neb. 512; 40 Cyc. 1150.

The proponents challenge also the sufficiency of the evidence to sustain the verdict of the jury with respect to the question of undue influence, and we are again required to search the record with respect to this issue to determine whether or not, with the most favorable view of the evidence to the contestants, they have established that the will was the result of the undue influence of John J. Bayer. Undue influence must be such as damages the free agency of the testator, at the time the will was executed. Mere supposition of undue influence is not sufficient to carry the case to the jury, but it must appear by proof, or by fair inference to be drawn from the facts established, that there was undue influence. *In re Jackson's Estate,* 220 Mich. 565. In respect to the execution of this will, there is not any testimony tending to prove that undue influence was exerted upon the testator by his son, John J. Bayer. The only evidence in the record that can be construed as intimating an undue influence is that of one of the daughters, and this evidence was not with respect to this will but relative to a deed that was given to the son in January 1921, sometime previous to the execution of this will, and three years before the testator died. At the time this deed was recorded, and all the children knew about it, this daughter testified that she spoke to him with reference to it and that he said: "Child, I will tell you the honest to God's truth, I had to have peace the rest of my life, he left me no rest and I had to do the like." This is the only evidence we have found in the record to support the contention of undue influence, and it was concerning a matter not relating to the will, which occurred three years before the death of the testator. This deed was not called in question during the life of the testator. The contestants in this case do not suggest that while he was living he lacked the mental capacity to transact his own business. For three years John J. Bayer was in possession of the land in question, with the deed recorded, a fact known to all of the contestants in this case. The thought suggests itself to us that, if Thomas Bayer, at such time, was not mentally competent to transact his own business, and was being imposed upon

by this son, the contestants in this case were negligent in their filial duty to their father, in not rallying to his relief at that time. The picture developed by the entire record in this case is of a strong, vigorous man, able to look after his own business, and so self-confident of that fact as to have brooked no interference from his children or or any one else. The record in this case, filled with petty family quarrels, most of which have arisen with this contest, and which it is hoped will be forgotten when it is ended, fails to disclose evidence sufficient to support a finding of the jury that the will was the result of undue influence exerted by John J. Bayer, and the question of undue influence exerted, as well as the question of testamentary capacity, should have been withdrawn from the jury. If sufficient evidence has not been introduced in a case upon the issue of undue influence to raise a question of fact upon conflicting evidence, then the court should direct a verdict. "Where the evidence in the contest of a will, on the ground of mental incompetency and duress, is insufficient to sustain a verdict in favor of the contestant on either of those issues, a peremptory instruction in favor of proponents is not erroneous." *In re Estate of Laflin*, 108 Neb. 298. The cause should not be submitted to the jury as an invitation to them to substitute their judgment as to the proper disposition of the property for that of the testator, and thus deny him the right to control his property while living, and to direct by will its use after his death.

In conformance with the foregoing opinion, the judgment is reversed and the cause remanded, with directions to enter judgment admitting the will to probate as the last will and testament of Thomas Bayer, deceased.

REVERSED.

STATE, EX REL. BEATRICE CREAMERY COMPANY, APPELLEE, V. FRANK MARSH, SECRETARY OF STATE, APPELLANT.

FILED DECEMBER 12, 1929. No. 27267.

1. **Licenses:** STATUTORY PROVISION. Section 681, Comp. St. 1922, provides that the corporation fee for domestic corporations shall be computed upon their paid-up capital stock. The language of this section is so clear and unambiguous that judicial construction is unnecessary and improper.
2. ———: ———: FRANCHISE TAX. The tax provided by section 681, Comp. St. 1922, is in its nature a franchise tax, rather than one upon the property, the capital stock, or the business of the domestic corporation.
3. **Commerce:** FRANCHISE TAX. Such a franchise tax levied by the state for the privileges and advantages of corporate existence and measured by the amount of the paid-up capital stock, rather than upon property without the state, or upon volume of business, is not a tax upon interstate commerce.
4. **Case Distinguished.** *State, ex rel. Case Threshing Machine Co., v. Marsh*, 117 Neb. 832, construed only the sections referring to the corporation tax of foreign corporations, and is not decisive of the question of the tax of domestic corporations presented here.
5. **Taxation:** CORPORATIONS: CONSTITUTIONAL PROVISIONS. The provision of section 1, art. XII of the Constitution, that foreign corporations shall not be given greater rights or privileges than are given domestic corporations, refers to the granting of franchises and corporate privileges, rather than taxation.

APPEAL from the district court for Lancaster county: FREDERICK E. SHEPHERD, JUDGE. *Reversed and dismissed.*

C. A. Sorensen, Attorney General, Clifford L. Rein and *Irvin A. Stalmaster*, for appellant.

Allen & Requartte, contra.

Heard before GOSS, C. J., ROSE, GOOD, THOMPSON, EBERLY and DAY, JJ., and THOMSEN, District Judge.

DAY, J.

The Beatrice Creamery Company commenced an action in the district court for Lancaster county, asking a writ of mandamus to compel the secretary of state to accept

$250 as its corporation tax for 1929. The defendant demurred to plaintiff's petition and appeals from an order overruling its demurrer. The plaintiff, a domestic corporation, has a paid-up capital stock of $12,000,000, of which only $690,000 is used and employed in carrying on its business in the state of Nebraska, while the remainder is used and employed in other states. This controversy wages over the question as to whether the annual corporation fee levied upon corporations shall be computed upon the total paid-up capital stock or only upon such capital employed in its business within the state. If the plaintiff, as it contends, should pay only such tax measured by its capital stock used and employed within the state, the amount tendered is computed upon this basis, and the writ should issue.

The corporation fee involved herein is provided by sections 679, 680, and 681, Comp. St. 1922. In substance these sections provide for the annual report of corporations organized under the law of this state, which report shall set forth, among other things, the amount of the authorized capital stock subscribed and paid up. It is further provided that the corporation shall pay an annual fee to the secretary of state, graduated in an ascending scale according to the amount of paid-up capital stock of the corporation. There is no ambiguity about the provisions of this statute, its language is clear and unequivocal, and there exists no necessity for a construction of these sections to determine the legislative intent. Indeed, these sections are so clear and unambiguous as to be improper subjects for judicial construction. It is self-evident and certain that the legislature intended that as to domestic corporations the fee should be computed upon its total paid-up capital stock.

This tax, which the state seeks to impose, is in its nature a franchise or excise tax. It is not a tax upon the property of the corporation. Neither is it a tax upon its capital stock, nor a tax upon the business of the corporation. The state of Nebraska gave the plaintiff corporate life and permits it to live. Its powers are derived from the laws of the state. The amount and the manner of the issue of

its stock, the liability of the holders thereof, and all other incidents in the creation, the growth and the development of this corporation, are all powers and privileges conferred upon it by the state. For all of these corporate benefits and advantages, the state seeks to levy a tax as the price of its corporate existence. If the corporation accepts the boon of corporate existence, it may well bear the burden. A state may tax a domestic corporation a franchise fee as it sees fit, and prescribe any mode of measurement for the fee it finds convenient. It may require the payment of a fee as a condition precedent to the granting of a charter to do business, and an annual fee each year for its continued exercise of rights and privileges of the franchise.

The plaintiff in this case contends that the tax imposed, being measured by the amount of paid-up capital stock, the most of which is employed in other states, amounts to a tax upon interstate commerce. It has a paid-up capital stock of $12,000,000, which stock was issued under, and by authority of, its corporate franchise. Its management, control, and use is governed by its franchise. The franchise fee, based as it is upon the amount of capital controlled by this franchise, is not a tax upon property without the state, or upon interstate business. *Kansas City, Ft. S. & M. R. Co. v. Kansas,* 240 U. S. 227; 12 C. J. 111. Such a tax, being for the privilege granted by the state for being a corporation, is not a tax upon interstate commerce because a part of the paid-up capital stock is employed in interstate commerce.

The plaintiff also urges that sections 683-697, Comp. St. 1922, indicate the intention of the legislature to place domestic and foreign corporations upon an equality with reference to the payment of the occupation tax. These sections of the statutes apply only to foreign corporations, and do not apply to domestic corporations. The recent case of *State v. Marsh,* 117 Neb. 832, is cited to support plaintiff's view. In that case the only question presented to the court for its determination was the construction of the above section of our statutes as applied to foreign corporations, and the language quoted relative to a domestic

corporation was used "arguendo," and was not decisive of the question here presented.

The next question presented is that section 1, art. XII of the Constitution of Nebraska, providing that foreign corporations shall not be given greater rights or privileges than are domestic corporations of a similar character, means equal protection to both foreign and domestic corporations. This provision refers to the granting of franchises and corporate privileges, rather than to taxation. In any event, the method provided for computing the tax upon corporations, foreign and domestic, is not unequal as between the two classes of corporations. The state of Nebraska is required to perform certain acts in relation to domestic corporations which are not required by foreign corporations. The tax levied on the foreign corporation merely permits it to exercise quasi-corporate powers within the state. The state is not required to regulate or supervise, nor would it be permitted to do so, the issuance and sale of stock. The state has neither duty to regulate the management of its corporate business, nor to dictate the functioning of the corporate body. Moreover, there is no inequality. Every state has the power to levy an excise tax upon its own corporate creations. Foreign corporations doing business in Nebraska are subject to a franchise tax in the state of their domicile, such state having the right to tax corporations created by it. 26 R. C. L. 121, 124, 125; *Delaware R. Tax,* 18 Wall. (U. S.) 206; *Wiggins Ferry Co. v. East St. Louis,* 107 U. S. 365; *Henderson Bridge Co. v. Kentucky,* 166 U. S. 150; *Society for Savings v. Coite,* 6 Wall. (U. S.) 594; *Home Ins. Co. v. New York,* 134 U. S. 594; *Flint v. Stone Tracy Co.,* 220 U. S. 107; *Kansas City, Ft. S. & M. R. Co. v. Kansas,* 240 U. S. 227; *International Shoe Co. v. Shartel,* 279 U. S. 429. Domestic corporations here are foreign corporations in other states and so the potential taxing power is equal with respect to all corporations doing business in the state.

The plaintiff urges that the inequality, just discussed, will have the effect of deterring corporations from organizing and engaging in business in Nebraska. The officers

of the state have, since 1913, applied and interpreted these sections of the statutes relative to foreign corporations as construed by this court in *State v. Marsh, supra,* and relative to domestic corporations as we do in this case. If such an application of the law is driving corporations from the state, it is a question of policy properly directed to the attention of the legislature rather than the court. For this same reason, the state argues, that we should give great consideration to the administrative and legislative interpretation of these sections of the statutes. Upon this question, we quote the language of *State v. Marsh, supra*:

"The continuous interpretation of the statute in question, placed upon it by the officers of the state charged with its enforcement, together with the fact that, notwithstanding such interpretation, although five sessions of the legislature have been held during that time, no attempt has been made to amend the law, is such an administrative and legislative construction upon the act as should be followed by the court. Such construction is of great persuasive force, and will ordinarily be adopted by the courts when it does not do violence to the language, purpose or policy of the act. *Douglas County v. Vinsonhaler,* 82 Neb. 810; *United States v. Minnesota,* 270 U. S. 181."

We are of the opinion that, although the sections of the statutes referring to foreign corporations subject them to a tax computed only upon the amount of paid-up capital actually employed in business in the state, the sections referring to domestic corporations require them to pay a tax computed upon their total paid-up capital stock. Computed upon this basis, the amount tendered the secretary of state is insufficient to pay the corporation fee of the Beatrice Creamery Company for 1929, and therefore the writ ought not to issue. The judgment of the lower court is reversed and the cause dismissed.

REVERSED AND DISMISSED.

IRVIN R. MOREARTY, APPELLANT, V. CITY OF MCCOOK, APPELLEE.

FILED DECEMBER 31, 1929. No. 26998.

Evidence in record examined and *held* to support the judgment.

APPEAL from the district court for Red Willow county: CHARLES E. ELDRED, JUDGE. *Affirmed.*

Bernard McNeny and *C. D. Ritchie*, for appellant.

Perry, Van Pelt & Marti and *Cordeal, Colfer & Russell, contra.*

Heard before GOSS, C. J., ROSE, DEAN, GOOD, THOMPSON, EBERLY and DAY, JJ.

PER CURIAM.

This is the second appearance of this cause before this tribunal. The issues presented on this appeal are somewhat different from those which engaged the attention of this court at the former hearing. *Morearty v. City of McCook*, 117 Neb. 113. The opinion in that case contains a full statement of the issues then before this court for consideration and the disposition made thereof. In substance it was declared in that opinion that the proof before the court established the fact that the plaintiff's contract was valid, had been substantially performed, and that the measure of damages sustained by the city, if any, would be the cost of remedying certain omissions of the plaintiff, and the case was remanded, with permission to defendant, city of McCook, to amend its answer setting up its damages, if any, occasioned by the failure of appellant, plaintiff below, to make final estimates and assessments of the cost of paving in question, if it so desired.

It is to be noted that the plaintiff in declaring on his contract in the first case alleged that plaintiff "has duly done and performed all things required of him by said contract of employment." So far as the subjects under consideration in this case, viz., the failure of plaintiff below to make final estimates and the assessments of the

cost of paving, the allegations in plaintiff's petition were traversed, if at all, at the former trial by a general denial only. It seems: "At common law it was ordinarily required of the pleader to make, not only an allegation of the performance of a condition precedent, but also a statement of the time and manner of its performance or an excuse for nonperformance, in order that the court might determine, as a matter of law, whether or not the intention of the parties had been fulfilled, and in order that a traversable issue might be presented. But according to the general rule as it now exists, and is established in some jurisdictions by statute, in pleading the performance of conditions precedent, it is not necessary for plaintiff to state the facts showing such performance, but he may aver generally that he has duly performed all the stipulations and conditions on his part; and in such case defendant cannot set up in defense the nonperformance of any condition which he has not specified in his plea." 13 C. J. 727, sec. 850. Our statute expressly provides: "In pleading the performance of conditions precedent in a contract, it shall be sufficient to state that the party duly performed all the conditions on his part." Comp. St. 1922, sec. 8640. Under such statutory provision the rule appears to be: "If defendant relies on the nonperformance of the contract by the plaintiff, he must allege that fact in his answer. In pleading such nonperformance, the facts which constitute the breach must be alleged, and the breach assigned must conform to the terms of the contract. * * * Where by statute plaintiff is authorized to plead a general performance of all conditions precedent, defendant must, if he relies on the fact that any of the conditions precedent have not been performed, set out specially the condition and the breach, thus confining the issue to be tried to such particular condition or conditions precedent as he may indicate as unperformed." And: "Where a breach by plaintiff is not such as to defeat his right of action, defendant cannot plead it in bar, but must take advantage of it by properly pleading it in recoupment of damages." 13 C. J. 738, sec. 879. See *Kahnweiler v. Phenix Ins. Co.*, 67 Fed. 483; *Penn*

Mutual Life Ins. Co. v. Ornauer, 39 Colo. 498; *Thomas v. Walden,* 57 Fla. 234; *McGrath v. Crouse,* 6 Kan. App. 507; *Preston v. Roberts,* 12 Bush (Ky.) 570; *Delaware River Quarry & Construction Co. v. Freeholders of Hunterdon,* 86 N. J. Law, 294.

A mere general denial, therefore, is insufficient to raise the issue. *Herpolsheimer v. Citizens Ins. Co.,* 79 Neb. 685. It would seem, therefore, under the pleadings in the case heretofore presented, considering substantial performance by the plaintiff of the contract sued upon as a condition precedent and the due performance thereof properly alleged in plaintiff's petition, this allegation had not been traversed by the plea of the defendant, and the sole and only contestable issues before the court at the time of our former hearing, in substance, were: First, that the contract sued upon had not been in fact made and entered into by the defendant city; and, second, that, if it had been, it pertained to regular official duties required of the plaintiff as the duly appointed city engineer of the city of McCook for which he could not lawfully receive compensation in excess of his salary. These contentions were resolved against the defendant in that case and with that disposition we are fully satisfied. The result of the situation then in suit was that, while substantial compliance with the contract of employment may be conceded to be a prerequisite to recovery, the allegation of plaintiff's petition of full performance had not in fact been traversed by the defendant and in legal effect stood admitted. On the other hand, as stated by Howell, J., in his opinion in that case, undisputed evidence appearing in the record disclosed that, while there had been a substantial performance of the contract, in certain respects such performance was actually incomplete. It thus plainly appears that upon the former appeal the defendant city, after determination by this court of the issues properly presented in its behalf, stood as one having mistaken its remedy. In this situation it is well established in principle that this court, in the exercise of its sound judicial discretion, may, notwithstanding the technical rights based upon procedure to which the opposing

party is ordinarily entitled, reverse the case, with directions to the trial court to permit a reformation of the issues, even though the latter may have in all respects proceeded strictly in accord with law. *Moseley v. Chicago, B. & Q. R. Co.*, 57 Neb. 636.

In the present case, therefore, we are fully satisfied with the opinion of Howell, J., heretofore adopted, remanding with directions to permit the defendant to amend its answer setting up its damages, if any, occasioned by the failure of the appellant, the plaintiff below, to make final estimates and assessments of the cost of paving in question. And we remain satisfied with the further instruction to the district court in connection therewith that the measure of damages would be "the cost of remedying the defects."

This court imposed no limitation on the powers of the trial court to hear and fully determine the subjects of action thus referred to it, and at the trial following the remand thus made, the record now before us discloses that the trial court instructed the jury in effect that the validity of the plaintiff's contract was not in question and that he had substantially performed the same, save and except that the plaintiff failed to make final estimates of the cost of paving and sewer construction and failed to make a valuation of the property benefited by such improvements and failed to assess the cost back against such property, and submitted to the jury for their determination the following interrogatory: "Question: What was the reasonable and necessary expense, if any, incurred, and damage sustained, by the defendant on account of the failure of the plaintiff to make the final estimates of the amount of work performed by and the amount due the contractor; the failure of the plaintiff to make a valuation of the property benefited by the paving and sewer construction; and the failure of the plaintiff to assess the cost of such paving and sewer construction back against the property benefited thereby?" This action is certainly in accord with the directions of this court.

To this interrogatory the jury returned the answer, "$15,000." Thereupon the court, deducting the amount thus found by the jury from the aggregate due the plaintiff, entered judgment for the sum of $9,416.50 in favor of plaintiff.

We have carefully considered the evidence in the bill of exceptions. It appears that the plaintiff submitted no evidence whatever on the issues then being considered. The defendant's evidence is therefore uncontroverted, and there appears to be sufficient competent evidence in the record to sustain the verdict. In this view of the case, we do not find that the court committed any reversible error in the application of the rule of damages prescribed for it, "the cost of remedying the defects," nor in its rulings on the admission of evidence. It follows that the action of the district court in the premises was correct and its judgment is therefore

AFFIRMED.

CHARLES W. MEAD, APPELLEE AND CROSS-APPELLANT, V. GUILES J. POLLY, APPELLEE AND CROSS-APPELLEE: GUILES J. POLLY, GUARDIAN, ET AL., APPELLANTS AND CROSS-APPELLEES: GUARANTY FUND COMMISSION ET AL., CROSS-APPELLEES.

FILED DECEMBER 31, 1929. No. 27009.

1. **Insane Persons: MORTGAGE BY GUARDIAN: NOTICE.** For the mortgaging of real estate by a guardian of an insane ward, the proceeding by which a license is granted under section 1436, Comp. St. 1922, by a district court for the purposes named therein, is a proceeding *in rem* and not adverse to the interests of the ward. In such cases the provisions of the foregoing section do not require service of the notice of the application for a license to be made upon the insane ward.
2. **Homestead.** The homestead right of a wife in lands owned by the husband and occupied by the family as a home is under section 5586, Comp. St. 1922, "real estate."
3. **Constitutional Law.** Section 1436, Comp. St. 1922, does not, by reason of not requiring notice to a ward, violate the constitu-

tional provision prohibiting the taking of property without due process of law.

APPEAL from the district court for Dakota county: MARK J. RYAN, JUDGE. *Reversed, with directions.*

Sherman W. McKinley and *George W. Leamer*, for appellants.

Sidney T. Frum and *Rose, Wells, Martin & Lane, contra.*

Heard before GOSS, C. J., DEAN, GOOD, EBERLY and DAY, JJ., and DINEEN, District Judge.

GOSS, C. J.

This appeal relates to the foreclosure of a mortgage. The guardian of Fanny Polly, insane, and her guardian *ad litem* appeal because the judgment allowed the plaintiff mortgagee to be subrogated by reason of prior liens paid off with the proceeds of his mortgage. The plaintiff cross-appealed because the court denied his right to a decree on his mortgage and because the amount awarded him was somewhat less under the finding and order of subrogation than would be due on his mortgage.

Inasmuch as the sustaining of the cross-appeal of the plaintiff would dispose of all the other issues in the case, we shall proceed to consider whether the plaintiff's mortgage was valid.

On April 30, 1915, Guiles J. Polly and Fanny Polly, his wife, executed and delivered a first mortgage on the 155 acres involved in favor of the United States Trust Company and a second mortgage thereon in favor of the same company for $600. While these mortgages still subsisted, Fanny Polly was, on March 27, 1921, adjudged insane, and was committed to the state hospital at Norfolk. On December 23, 1922, Guiles J. Polly filed in the county court his petition to be appointed guardian of his wife. On January 15, 1923, he was so appointed, he qualified and ever since has been such guardian. On December 26, 1922, Mr. Polly applied to the Omaha Trust Company in writing for a loan of $8,000 on this land, stipulating that the mortgage

should be a first lien, appointing an agent to receive the money, and authorizing the deduction, from the proceeds of the loan, of any advances so made. On January 31, 1923, the guardian filed in the district court for Dakota county a petition for a license to execute a mortgage for $8,000 on the said land owned by him but in which Fanny Polly had an interest by reason of her relationship to him. He pleaded rather fully the existing liens on the property and certain expenses of the guardianship and of his ward, showing that the total amount of the proceeds of the loan would be needed for these purposes. On February 8, 1923, the judge of the district court made the order authorizing the guardian to execute a mortgage upon the interest of said Fanny Polly and Guiles J. Polly for $8,000 for the purposes named.

On March 31, 1923, Polly, for himself and as guardian for his wife, executed and delivered to the Omaha Trust Company a mortgage for $8,000 on the land to secure a note for that sum. The note and mortgage were afterward assigned to plaintiff. A considerable portion of the proceeds was used to pay off the two mortgages to the United States Trust Company and to discharge tax liens on the property. The balance of the $8,000 was paid to Polly to be used for the purposes stated in his application.

In their original brief the appellants set forth only two errors relied upon for reversal: First, that the court erred in allowing the plaintiff to be subrogated; and, second, that it erred in allowing 10 per cent. interest. But in their reply brief they went directly to the main point in plaintiff's cross-appeal and presented the question whether section 1436, Comp. St. 1922, which was in effect when the license to execute plaintiff's mortgage was granted, authorized the guardian to execute the mortgage upon the homestead standing in his name. The appellants take the negative of that question; upon the affirmative depends plaintiff's rights to establish the full lien of his mortgage as contended for in his cross-appeal.

So the first and chief issue between the parties is this: Had the district court authority to grant to Guiles J. Polly,

guardian of Fanny Polly, the right to mortgage her interest in land of her husband in which she had a homestead interest and an inchoate right to take under the statutes of descent if she survived her husband?

In 1927 the history of section 1436, Comp. St. 1922, was carefully reviewed down to and including the amendment in chapter 104, Laws 1923, and it was held constitutional as against an attack involving the question whether the amendment shown in chapter 205, Laws 1921, contained more than one subject clearly expressed in the title of the act. *In re Estate of Austin*, 116 Neb. 137.

The decree of the district court in the case at bar did not expressly find nor adjudge the section unconstitutional. It merely found, referring to plaintiff's mortgage on the homestead, that "the said mortgage is not a valid lien thereon because it was not signed and acknowledged by the said Fanny Polly, and plaintiff is not entitled to the foreclosure thereof." Nor do appellants expressly argue that section 1436 is unconstitutional. Rather they say it does not apply to such a state of facts as involved here. In their reply brief they say: "This particular point has never been decided by this court. It is a question of the reading of the statute."

They rely upon and stress the lack of notice given to Fanny Polly when the license was obtained and by implication suggest that, if the statute was otherwise applicable as a basis for a license, it was unconstitutional in that it allowed Fanny Polly to be deprived of her property without due process of law, because the statute does not provide for notice. Nor was any notice given her of the proceedings in which the license to mortgage was granted.

In *Myers v. McGavock*, 39 Neb. 843, it was held: "An application by a guardian for license to sell the real estate of his wards for their maintenance and education is a proceeding *in rem*—one instituted by their guardian for their benefit. It is, in effect, the application of the wards. It is not a proceeding adversary to them; and notice to them of such application is not essential to the jurisdiction of the district court to grant the license."

In *Hunter v. Buchanan,* 87 Neb. 277, Chief Justice Reese writing the opinion, it was held: "A sale of real estate by a guardian of an insane ward, under license for the purpose of paying debts due from the ward, is a proceeding *in rem,* and not adverse to the interests of the ward. In such cases the provisions of section 49, ch. 23, Comp. St. 1909, do not require the service of the notice of the application for a license to be made upon the insane ward." The opinion quoted from one of like effect, delivered by Mr. Justice Field in *Mohr v. Manierre,* 101 U. S. 417, in a case likewise involving the real estate of an insane person under a Wisconsin statute.

Although it is not the universal rule, yet it has been held uniformly by this court that, in proceedings under a license obtained "by an administrator to sell real estate of his decedent for the purpose of paying debts, there are, strictly speaking, no adverse parties. The proceeding is of the nature of an action *in rem.*" *Brusha v. Phipps,* 86 Neb. 822; *McClay v. Foxworthy,* 18 Neb. 295; *Schroeder v. Wilcox,* 39 Neb. 136. Such being the rule adopted in administrator's sales in this jurisdiction, "it follows with the stronger reason" that it must apply to sales by guardians of insane wards, as was stated in *Hunter v. Buchanan, supra.*

So we are of the opinion that, for the mortgaging of real estate by a guardian of an insane ward, the proceeding by which a license is granted under section 1436, Comp. St. 1922, by a district court for the purposes named therein is a proceeding *in rem* and not adverse to the interests of the ward. In such cases the provisions of the foregoing section do not require service of the notice of the application for a license to be made upon the insane ward.

Section 1436 provides that a district court or judge thereof may grant authority to guardians of estates to mortgage any real estate belonging to such estates for the purposes named. Appellants assert that the land involved here was not real estate belonging to Fanny Polly and therefore it did not come under the statute. It cannot be disputed that she had an interest in the land by virtue of

her homestead right and an interest therein by virtue of her inchoate right to take by descent if she survived her husband; and that she could not be divested of her homestead right by conveyance or incumbrance save by an instrument in which she was joined by her husband. Comp. St. 1922, sec. 2819.

In *Galligher v. Smiley*, 28 Neb. 189, it was held that a homestead is constituted by residence of the family and by selection according to law. "Where these things exist, the homestead becomes a right in the premises, exempted by law from forced sale."

Section 5586, Comp. St. 1922, says: "The term 'real estate,' as used in this chapter, shall be construed as coextensive in meaning with 'lands, tenements and hereditaments,' and as embracing all chattels real, except leases for a term not exceeding one year."

The interest of Fanny Polly in the real estate was a vested interest. It could not be divested by her husband alone either by deed or by will. It may be alienated or abandoned, but in this instance it has not been abandoned. It is still the family homestead. Whether a homestead right is technically an estate or is a chattel real it is unnecessary to determine here. It is a more essential right than a leasehold estate for a year and a day, which is defined by the statute as a chattel real. For the purposes of this case, we hold that the homestead right of a wife in lands owned by the husband and occupied by the family as a home should be construed under section 5586, Comp. St. 1922, as "real estate."

We have shown that the interest of Fanny Polly in the land was an interest in real estate; and that no notice was given her and none was necessary in the proceedings in the district court in which license was granted her guardian to mortgage the lands involved. It therefore follows that section 1436, Comp. St. 1922, does not, by reason of not requiring notice to a ward, violate the constitutional provision prohibiting the taking of property without due process of law. The district court had jurisdiction of the sub-

ject-matter and of the parties and was authorized to grant the license.

No appeal was taken from the judgment of the district court granting the license to make the mortgage sought to be foreclosed by plaintiff. Therefore, the attack thereon by the defendants, who are appellants here, is a collateral attack and cannot be sustained. The guardian had given a bond and he and his surety are legally responsible for the failure, if any, to protect the rights of the ward in the distribution of any of the net balance of the proceeds of the mortgage after payment of the existing liens on the land. Plaintiff's mortgage and the liens paid by him were valid and were fully proved. No valid defense was shown. He should have had judgment.

Having reached the conclusion that the plaintiff's mortgage is valid and should be enforced in full, it follows that the decree was erroneous; and it becomes unnecessary to consider the claims of the appellants arising by reason of the erroneous decree allowing subrogation only.

The judgment of the district court is reversed, with directions to enter a decree in favor of the plaintiff for the amount due on his mortgage, including, of course, the liens of taxes paid by him under the provisions of the mortgage.

REVERSED.

P. F. PETERSEN BAKING COMPANY, APPELLEE, V. CITY OF FREMONT, APPELLANT.

FILED DECEMBER 31, 1929. No. 26927.

1. **Licenses.** To be valid, a city ordinance imposing an excise or a license tax upon a business or an occupation must be definite in its application to those upon whom the burden falls, reasonable in amount and uniform as to the class upon which it operates.
2. **Hawkers and Peddlers: "ITINERANT VENDOR."** In a city ordinance the term "itinerant vendor" of bread and of other enumerated commodities at wholesale does not, in absence of a legislative definition, include a wholesale baker selling bread and distributing it daily to his regular retail customers by means of his own motor trucks.

3. **Licenses: VALIDITY.** An excise tax on the wholsale business or occupation of a baker who sells bread and distributes it daily by motor truck to regular customers in a neighboring city is void if so excessive and confiscatory as to amount to a prohibition to do so.

APPEAL from the district court for Dodge county: FREDERICK L. SPEAR, JUDGE. *Affirmed.*

Allen Johnson, for appellant.

Montgomery, Hall, Young & Johnsen, contra.

Heard before GOSS, C. J., ROSE, GOOD, THOMPSON, EBERLY and DAY, JJ., and THOMSEN, District Judge.

ROSE, J.

This is an action to recover from the city of Fremont, defendant, $600 exacted by it in the form of license taxes on the occupation and business of itinerant vendors of bread at wholesale. That amount was demanded by defendant and paid under the terms of a city ordinance imposing a yearly license tax of $300 "on each itinerant vendor" of bread and of other enumerated commodities at wholesale. P. F. Petersen Baking Company, plaintiff, paid the annual tax of $300 August 13, 1927, and demanded repayment August 16, 1927. The Standard Bakeries Corporation paid the annual tax of $300 August 27, 1927, demanded repayment August 30, 1927, and afterward assigned its claim for repayment to plaintiff. The demands for the return of the two items amounting to $600 were based on the ground that the ordinance and the taxes were illegal and void. The city refused to comply with the demands for repayment, retained the money so exacted, and plaintiff brought this action to recover it back. The facts upon which plaintiff relies for a recovery are fully pleaded in the petition which challenges the ordinance and the taxes as fatally indefinite, unreasonable and confiscatory.

The validity of the ordinance and the reasonableness of the taxes are pleaded in an answer to the petition. The answer contains also a plea that the corporations named are "itinerant vendors" of bread at wholesale in Fremont

within the meaning of that term as used in the ordinance.

Upon a trial of the case the district court found that the ordinance was indefinite, unconstitutional and void, and that the taxes levied under it were unreasonable and confiscatory. From a judgment in favor of plaintiff for $659.50, including interest, defendant appealed.

The validity of the ordinance and taxes is the question presented by the appeal. In the first section the ordinance provides:

"That there is hereby levied a license tax on each and every occupation and business within the limits of this city, in this section enumerated, to raise revenue thereby in the several different sums on the several different businesses and occupations respectively as follows: * * *

"On each itinerant vendor at wholesale, of fruits, potatoes, vegetables, flowers, groceries, hay, straw, bread, grain, pastries, or other kinds of goods not herein specified, $300 per year."

To prevent criminal prosecutions and interruption of business requiring plaintiff and its assignor to make daily sales and deliveries of bread to retail dealers and regular customers in Fremont, the taxes in controversy were paid as indicated. Plaintiff and its assignor are wholesale bakers of bread in Omaha. By means of their own motor trucks they distribute daily their own products to retail dealers and customers within a radius of 75 miles, including retailers in Fremont. To be valid a city ordinance imposing an excise or a license tax upon a business or an occupation must be definite in its application to those upon whom the burden falls, reasonable in amount and uniform as to the class upon which it operates. Its application should not be left by city lawmakers to the whim or caprice of taxing or collecting officers. A valid excise or license tax depends on a lawful exercise of legislative power—a power not committed to administrative or police officers. The term "itinerant vendor" is not defined by city ordinance in the present instance. It has no legal or popular meaning that extends its application to a wholesale baker selling bread and distributing it daily to regular re-

tail customers by means of its own motor trucks. Taxing or collecting officers are without authority to supply such a definition or to extend the municipal legislation beyond its definite import. That part of the ordinance relating to each "itinerant vendor" at wholesale is obviously indefinite and uncertain and for that reason is unenforceable in absence of a legislative definition of the term quoted.

The provision in controversy, as the city treasurer has attempted to apply it, would not be uniform as to class, even if the words "itinerant vendor" had been made applicable to plaintiff and its assignor in definite terms. They are engaged in a lawful enterprise on an extensive scale. They have a right to conduct their business in Fremont on reasonable terms applicable alike to all wholesale bakers in the same class. They cannot legally be excluded from Fremont by means of a prohibitive excise tax that wholesale bakers therein are not required to pay. The evidence shows a discrimination. Wholesale bakers in Fremont were not subjected to the business or occupation taxes. In practical effect those taxes were not imposed for licenses permitting the Omaha bakers as licensees to transact business in Fremont but to prevent them from doing so. The city's discrimination as to class gave the term, "itinerant vendor" of bread at wholesale, an unauthorized meaning amounting to "nonresident vendor." The taxes, as the city attempted to enforce the ordinance, were not, therefore, uniform as to class.

The taxes were also invalid as imposing an unreasonable and confiscatory burden. It is a fair inference from the evidence that the net annual profits of each of the two Omaha bakeries, based on net earnings at the time of the trial, exclusive of the excise taxes, would be approximately $420. An annual tax of $300 on the occupation of each would destroy the incentive to sell and deliver bread in Fremont and would amount to an illegal prohibition of the right to do so. The law applicable to the present controversy has been stated as follows:

"While cities of the second class having more than five thousand inhabitants have authority to impose a tax on

any occupation or business within the limits of the city, yet such ordinances must be so framed as to make such taxes uniform in respect to the classes upon which they are imposed; and such taxes must be reasonable, considering the nature of the business, and not so high as to prohibit the carrying on of the business." *Caldwell v. City of Lincoln*, 19 Neb. 569.

There does not seem to be any error in the proceedings and the judgment of the district court.

AFFIRMED.

FARMERS GRAIN, LUMBER & COAL COMPANY, APPELLEE, V. SHERMAN TAYLOR, SR., APPELLANT.

FILED DECEMBER 31, 1929. No. 26987.

Trial: PEREMPTORY INSTRUCTION. Where the evidence on a controverted issue of fact is sufficient to support a verdict for defendant, a peremptory instruction in favor of plaintiff is erroneous.

APPEAL from the district court for Gage county: FREDERICK W. MESSMORE, JUDGE. *Reversed.*

Bartos & Placek, Grant G. Martin and *J. A. McGuire*, for appellant.

C. B. Ellis, Jack & Vette, and *Sanden, Anderson, Laughlin & Gradwohl, contra.*

Heard before ROSE, DEAN, GOOD, THOMPSON, EBERLY and DAY, JJ., and FOSTER, District Judge.

ROSE, J.

Plaintiff sued Sherman Taylor, Sr., defendant, to recover $363.89 with interest on an account for merchandise delivered to his son, Edwin Taylor, at the special request of defendant upon the latter's oral promise to pay plaintiff therefor. The answer was a general denial. Pending litigation defendant died and the cause was revived in the name of Sherman Taylor, Jr., administrator, defendant. The case was tried to a jury and at the close of the testi-

mony the district court directed a verdict in favor of plaintiff for $395.18. From a judgment for that sum defendant appealed.

One of the assignments of error challenges as erroneous the peremptory instruction in favor of plaintiff. During the trial the parties stipulated that the amount due plaintiff from defendant, if anything, was $395.18. Plaintiff took the position that the senior Taylor procured the merchandise for his son by means of an original, oral promise to pay for it. The defense was that the promise, if made, was one to answer for the debt of another and, not being in writing, was void under the statute of frauds. An examination of the record on this issue shows there is evidence tending to prove the defense, thus presenting a question for the jury. The peremptory instruction in favor of plaintiff was therefore erroneous. It follows that the judgment of the district court is reversed and the cause remanded for further proceedings.

REVERSED.

JULIUS A. JOHNSON V. STATE OF NEBRASKA.

FILED DECEMBER 31, 1929. No. 26935.

1. **Criminal Law**: WITNESSES: CREDIBILITY. "It is elementary that where, in a criminal prosecution, the evidence conflicts in respect of material facts, the credibility of the respective witnesses is for the jury." *Baker v. State*, 112 Neb. 654.
2. ———: EVIDENCE: REVIEW. "Unless it appears that the evidence in the trial of a criminal case is so deficient that all reasonable minds, if uninfluenced by passion or prejudice, must agree that there is reasonable doubt of the guilt of the defendant, a reviewing court cannot set aside the verdict of the jury as unsupported by the evidence." *Johnson v. State*, 88 Neb. 328.

ERROR to the district court for Nemaha county: JOHN B. RAPER, JUDGE. *Affirmed in part.*

T. F. A. Williams, Edgar Ferneau, Fred G. Hawxby and *Robert M. Armstrong*, for plaintiff in error.

C. A. Sorensen, Attorney General, and *Irvin A. Stalmaster, contra.*

Heard before GOSS, C. J., DEAN, GOOD, THOMPSON, EBERLY and DAY, JJ., and REDICK, District Judge.

DEAN, J.

December 1, 1928, an information was filed in the district court for Nemaha county against Julius A. Johnson, defendant, wherein he was charged in four counts with the embezzlement of $11,681, during the months of March, April, and May, 1928, from the Farmers Security State Bank of Rohrs while he was cashier of the bank. The first count charges an embezzlement of $1,500, on or about April 13, 1928; the second an embezzlement of $81, on or about April 11, 1928; the third an embezzlement of $100, on or about March 17, 1928; and the fourth count charges an embezzlement of $10,000, on or about May 15, 1928, making the total sum of $11,681, as noted above, which was charged as having been embezzled by the defendant. The jury found the defendant guilty on all of the above named counts. The court thereupon sentenced defendant to serve from one to six years in the penitentiary on each count of the information, the sentence to run concurrently. The defendant prosecutes error.

It must first be noted that in respect of the fourth count the state, in its brief, concedes that "not enough witnesses whose accounts were short were called to establish the aggregate" sum of $10,000, named in the fourth count of the information. It follows, of course, that the prosecution of the fourth count, having been abandoned by the state in its argument, need not here be noticed further.

In behalf of the defendent his counsel contend that his mentality was so defective that defendant was unable to distinguish between right and wrong at the time when he committed the acts complained of, and that the judgment should therefore be reversed. And in respect of defendant's mental condition at all times material to this inquiry, the evidence of two physicians was submitted to the jury, and it appears from their evidence that defendant was suf-

fering from a tumor on his brain at the time in question and that he underwent an operation therefor shortly after the acts complained of are charged as having been committed. It appears, however, that the tumor was not removed because of the fact that, as advised by both physicians, such an operation would endanger his life. And both physicians also expressed the opinion that the defendant, at the time in question, did not have the ability to distinguish between right and wrong. The state, however, offered the evidence of six or seven nonprofessional witnesses, mostly neighbors of defendant, and they testified to the contrary in respect of mentality.

A bank examiner testified that, when he went to the bank to make an examination of its condition shortly before the defendant was apprehended, the defendant "seemed to know just what he was doing." He further testified: "Q. State, when you called upon him for explanations of certain items, the manner of his replies and the conversation with relation thereto. A. The answers usually came very quickly and very plausibly as to the subject that I was asking about." From the evidence of this witness, and other witnesses on this feature, it appears that sufficient competent evidence was introduced to warrant a finding by the jury that the defendant could distinguish right from wrong at the time of the commission of the offenses. To substantially the same effect was the evidence of the cashier of a bank in a neighboring town. This witness testified that they at one time worked in the same bank and that he observed no change in defendant's manner or general conduct or appearance since the time when they formerly worked together, and that in his opinion the defendant then, and at the time of the trial, knew right from wrong.

A merchant of Rohrs, who had lived there 40 years, was president of the Rohr bank four years and also a member of the board of directors. He testified that his store was located next to the bank building where defendant was employed and that defendant was the only person in charge of the bank during this four-year period. He also

testified that the defendant's conduct was then peculiar in some respects, but that he did not see any difference in the way he had always done his work, and that, in his opinion, defendant's mentality was such that he could distinguish between right and wrong during all the time of his acquaintance with him.

Another witness saw defendant nearly every day and in his opinion, defendant was apparently always the same and could distinguish right from wrong. The evidence of another witness was that defendant absolutely knew right from wrong; that he attended school with him and at a later period they worked in the same bank, and that "Gus (the defendant) while he was a nervous dispositioned fellow and his dress was always reasonably good and he had a peculiar way of handling business perhaps that was his own, natural, but then he handled it." In the expressed opinion of this witness, the defendant was able to distinguish right from wrong in respect of the acts complained of herein.

A banker in a neighboring city, and at or about the time in the employ of the guaranty fund commission, testified that his acquaintance with the defendant continued for about 25 years before defendant was complained against. When interrogated as to whether the books of the bank would balance where "an individual submits a check to the bank, upon the bank, which the bank pays and charges to his account in the sum of $1,500 and gives for that check a certificate of deposit for the bank for $1,500, while the books of the bank contain no record of the certificate of deposit," he answered that the books would not balance, and "the cash should be long," and that, to make the books balance, $1,500 in cash would have to be taken from the bank. He also testified that in one instance $81 was handed to defendant for deposit by one of the bank's patrons, for which a duplicate deposit slip was given but no entry was made in the bank books of this deposit. He also testified that a shortage of $100 appeared in another account and without the depositor's knowledge. And in another in-

stance it appears that defendant took $500 out of a depositor's account without the knowledge of the depositor.

In respect of the $81 deposit, above referred to, the depositor testified that the defendant gave her a duplicate deposit slip therefor, but that the $81 was never entered in her passbook. Another testified that he deposited a check for $1,500 for which he received a duplicate deposit slip from the defendant, but that no entry was ever made on the bank books of the deposit so made by him. It also appears from the evidence of other witnesses that their passbooks disclosed withdrawals of money from their accounts in amounts for which they did not write checks, and that their passbooks were balanced by the defendant.

Certain witnesses testified on defendant's part that he was a man in good repute in his home community. Others testified that his mentality was failing. But the case was tried in defendant's home community before a jury which was composed of men, so far as the record discloses, who were impartial and unbiased as between the parties.

"It is elementary that where, in a criminal prosecution, the evidence conflicts in respect of material facts, the credibility of the respective witnesses is for the jury." *Baker v. State,* 112 Neb. 654.

It clearly appears that the defendant had abundant opportunity to divert the money of the depositors in the bank and to appropriate it to his own use without immediate detection. The charge of defendant's malfeasance is established beyond a reasonable doubt and the verdict is sufficiently supported by the evidence. We have held that:

"Unless it appears that the evidence in the trial of a criminal case is so deficient that all reasonable minds, if uninfluenced by passion or prejudice, must agree that there is reasonable doubt of the guilt of the defendant, a reviewing court cannot set aside the verdict of the jury as unsupported by the evidence." *Johnson v. State,* 88 Neb. 328.

Defendant complains of the court's refusal to give certain instructions, and also of certain instructions given by the court. We have examined the instructions and, when

considered in their entirety, we do not find prejudicial error.

The judgment of the trial court must be and it hereby is affirmed in respect of all counts except the fourth which the state, as herein noted, concedes is not supported by sufficient evidence to sustain a conviction. In all other respects the judgment is affirmed.

AFFIRMED IN PART.

ESTHER LIEB, APPELLANT, V. OMAHA & COUNCIL BLUFFS STREET RAILWAY COMPANY, APPELLEE.

FILED DECEMBER 31, 1929. No. 26999.

1. **Negligence**: QUESTION FOR JURY. In a personal injury action involving the issues of negligence and contributory negligence, and where, from the evidence respecting such issues, different minds may reasonably draw different conclusions, the question is one of fact for the jury.
2. ———: TRIAL: INSTRUCTION. In a personal injury action, grounded upon the negligence of the defendant, and where contributory negligence is alleged as a defense, and there is evidence tending to prove the charge of negligence and contributory negligence, it is incumbent upon the trial court to give an instruction stating the comparative negligence rule, as provided by section 8834, Comp. St. 1922.
3. **Carriers**: NEGLIGENCE: REFUSAL OF INSTRUCTION. In an action by a passenger against a street railway company for personal injuries caused by starting, without warning, a street car while plaintiff was either in the act of alighting or about to alight therefrom, it is error for the trial court to refuse an instruction informing the jury that it was the duty of defendant, after stopping the car for passengers to alight, to wait a sufficient length of time, before putting the car in motion, to permit passengers, in the exercise of reasonable diligence, to alight in safety.
4. ———: ———: PLEADING. In an action for personal injuries, where plaintiff, a passenger, in her petition charged that, while in the exercise of due care on her part, she was on the rear platform steps of the street car, in the act of alighting therefrom and that the agents and employees of said defendant negligently, wrongfully, and without due notice to plaintiff, caused said street car to be suddenly started forward. such

allegation is sufficiently broad to cover the question as to whether the car was stopped a sufficient length of time to permit plaintiff to alight in safety.

5. ———: ———: ERRONEOUS INSTRUCTION. In a personal injury action for damages, by a passenger of a street railway, grounded on the alleged negligence of the defendant in starting its street car, without warning, while she was upon the rear platform in the act of alighting therefrom, and the evidence tends to support such charge, it is error to instruct the jury that defendant does not owe a duty to warn such passenger that the car is about to be started.

APPEAL from the district court for Douglas county: CHARLES E. FOSTER, JUDGE. *Reversed.*

Waldron, Silverman & Newkirk, for appellant.

Edward J. Shoemaker, contra.

Heard before GOSS, C. J., ROSE, DEAN, GOOD, EBERLY and DAY, JJ., and DINEEN, District Judge.

GOOD, J.

This is a personal injury action in which defendant had the verdict and judgment, and plaintiff has appealed.

It was alleged in the petition that plaintiff was a passenger in one of defendant's street cars; that she signaled her intention to alight at the next stopping place; that the car stopped, and while she was in the act of alighting therefrom it was negligently and suddenly started by the motorman, and she was thereby thrown to the ground and sustained serious injuries. Defendant answered, denying any negligence, and alleged that at the time of the accident plaintiff attempted to leave the car after it was in motion, and that the accident and alleged injuries were due solely and entirely to her contributory negligence. In her reply plaintiff denied contributory negligence.

From the record it appears that plaintiff, her daughter, and sister-in-law were passengers on one of defendant's street cars in Omaha, and that as it was approaching the intersection of Commercial avenue and Boyd street she signaled to the conductor her intention to alight; that the

car stopped and the three started to alight; that the daughter was first and alighted in safety; that the plaintiff was second, and while in the act of stepping from the street car it was put in motion, she was thrown to the pavement and sustained injuries, and that no notice was given by the motorman of his intention to start the car at the time. These facts appear without dispute. It also appears that at the street intersection, above mentioned, there is a steam railway, and that the rules of the defendant require the conductor to go forward upon the tracks thereof, to see that there are no approaching trains, and then to signal to the motorman to proceed. The evidence of defendant tends to show that the conductor, after the car had stopped and some passengers had alighted, proceeded ahead of the car to the railway crossing and signaled to the motorman to proceed; that he did not see any passengers alighting, or attempting to alight, from the car at the time he signaled to the motorman, but that the car had proceeded but a few feet when he observed a passenger, in an attempt to alight, falling to the pavement, and that the car was immediately stopped. The motorman testified that after receiving the signal from the conductor to proceed he looked to the rear of the car and saw no passengers on the platform or attempting to alight. The testimony of a passenger, a witness for defendant, tends to show that plaintiff had gone to the rear platform for the purpose of alighting from the car at the time it was started.

The errors assigned are that the verdict is contrary to law and the evidence, and not sustained by sufficient evidence, and in the giving and refusing of instructions.

With respect to the sufficiency of the evidence, it appears that there was evidence on behalf of defendant tending to prove that plaintiff had ample opportunity to alight from the car while it was standing, and that she attempted to alight after the car had started. The rule applicable is that, where different minds may reasonably draw different conclusions as to the negligence and contributory negligence from the facts proved, then the question is one of fact for the jury and not one of law for the court. Wheth-

er plaintiff was guilty of such contributory negligence as would affect her right to recover was a question of fact to be determined by the jury under proper instructions.

The pleadings and evidence raised the questions of defendant's negligence and plaintiff's contributory negligence. Section 8834, Comp. St. 1222, provides:

"In all actions brought to recover damages for injuries to a person or to his property caused by the negligence of another, the fact that the plaintiff may have been guilty of contributory negligence shall not bar a recovery when the contributory negligence of the plaintiff was slight and the negligence of the defendant was gross in comparison, but the contributory negligence of the plaintiff shall be considered by the jury in the mitigation of damages in proportion to the amount of contributory negligence attributable to the plaintiff; and all questions of negligence and contributory negligence shall be for the jury."

This section was applicable to the record presented in this case. It was the duty of the trial court to give to the jury an instruction on comparative negligence in accordance with the statute. This the trial court failed to do; its failure was prejudicial error.

Plaintiff complains of the court's refusal to give an instruction to the effect that it was the duty of defendant, after stopping the car for passengers to alight, to wait a sufficient length of time to permit passengers, in the exercise of reasonable diligence, to alight in safety, before putting the car in motion. That the instruction states a sound principle of law is not controverted, but defendant argues that it was properly refused because it was not applicable to the issues raised, and contends that failure to stop the street car long enough to permit plaintiff to alight in safety was not alleged in the petition and, therefore, this issue was not presented.

We are unable to accept defendant's view as to the effect of the pleading. The allegation of the petition in that respect is: "While plaintiff in the exercise of due care on her part was on the rear platform steps of said street car, in the act of alighting therefrom, the agents and em-

ployees of said defendant in charge of said street car wrongfully, negligently and with utter disregard for the safety of this plaintiff, and without notice to plaintiff, caused said street car to be suddenly started forward, thereby causing plaintiff to be violently thrown from said street car steps to the ground."

In *Cain v. Kanawha Traction & Electric Co.*, 81 W. Va. 631, the supreme court of West Virginia had before it practically the identical question. In that case the allegations of the petition were very similar to those in the instant case, and the question there presented was, as here contended by defendant, that the allegations were insufficient to raise the question of failure to stop the car a sufficient length of time to permit passengers to alight. In that case it was held:

"In an action for personal injuries the declaration charged that defendant, while plaintiff, a passenger, was in the act of alighting, without warning him 'carelessly and negligently and suddenly' started its car whereby and with great force and violently he was thrown upon the pavement and injured. The evidence tended to prove that plaintiff was not given a reasonable time to alight, and that the conductor of the car in disregard of his duty signaled the motorman to go ahead, while plaintiff was in the act of leaving the platform. There was no variance."

In the body of the opinion it was said (page 634):

"We observe that the allegation is not that the car was suddenly and *violently started*, but that it was 'carelessly and negligently and suddenly' started and without 'warning to him.' * * * It has been frequently decided here, in actions of this character, that there is no variance in respect to specification of mere matters of detail, concerning the manner or instrumentalities by which the injury is inflicted, if the substantial elements of negligence be proved. *Kennedy v. Chesapeake & O. R. Co.*, 68 W. Va. 589, 592, and cases cited.

"If on the trial the evidence was sufficient to establish the fact that plaintiff was not under all the circumstances allowed a reasonable time to alight, or the defendant was

otherwise negligent in not observing him in his perilous condition and protecting him, and he was without fault, * * * would not such evidence support without variance the charge of carelessly, negligently and suddenly starting the car and doing plaintiff the injuries as charged? We think it would."

The reasoning of the court in the above case appeals to us as logical and sound. A careful examination of the allegation of negligence in the petition in the instant case will disclose that the negligence does not relate to the manner in which the car was started, but to the time of starting; that is, when plaintiff was either alighting from the car or about to alight. Whether sufficient time was given was fairly included in the averment. It follows that the refusal to give the requested instruction was erroneous.

Plaintiff further complains of the refusal of the court to give the following instruction:

"You are instructed that where a street car is stopped on signal at a regular car stop to permit passengers to alight, and the employees of the street railway company know, or by the exercise of proper care should know, that the passenger is attempting to alight, it is negligence to put the car in motion before such passenger has alighted or while he is attempting to do so; and the fact that the rules of the street car company require conductors, before crossing the tracks of a steam railroad, to go forward, and on the tracks of the steam railroad and look for other cars or locomotives thereon, before signaling the motorman to go ahead, will not excuse the conductor from first discharging his duties to passengers alighting from his car."

There is abundant authority to sustain the proposition of law stated in the requested instruction. The rule is stated and supported by many authorities in the annotation to *Wright v. Boston & M. R. Co.*, 83 N. H. 136, 56 A. L. R. 975, 981. The following cases are especially in point: *Oklahoma U. R. Co. v. Mitchell,* 105 Okla. 152, and *Memphis Street R. Co. v. Shaw,* 110 Tenn. 467. The instruction requested was applicable to the situation disclosed by the record. Denial of the request was error.

Complaint is made by plaintiff of the sixth instruction given by the court in the following language:

"You are instructed that it is not the duty of the defendant company, or its servants, to warn its passengers that the car upon which they are riding is about to start, and, therefore, you are not to consider that an act of negligence in the determination of this cause."

Plaintiff argues that the instruction is not a correct statement of the law, and that, even if it were, it is not applicable to the situation; while defendant contends that it correctly states the rule and cites and relies upon a number of cases, all of which we have examined, and we find none in point. Several of those cases relate to passengers who had entered the street car but had not yet reached their seats, and, as to such a situation, it was held that no duty rested upon the street railway company to warn such passengers of the intention to start. Among the cases cited to support defendant's contention is *Jacobson v. Omaha & C. B. Street R. Co.*, 109 Neb. 356. In that case a passenger had alighted from the street car, and the question there was as to the duty of the company to warn passengers of danger from other sources in the street onto which the passenger was alighting, and had no relation to the giving of warning that the car would start. It is quite evident that, if one is about to enter a car and has one hand, possibly, upon the rail, before the car is started the passenger should, under such circumstances, be given sufficient time to enter the car, or warned that the car is about to start, so that he may not attempt to enter. The same rule is applicable to a passenger alighting from a car. If one is in the act of alighting, or about to alight, from a car, it should not be started without warning so that the passenger may not attempt to alight. Even the rule, as applied to passengers standing up in a car, has been modified, as where such persons were known to be afflicted with some disease or crippled, and it has been held that before starting the car even such persons were entitled to be warned. *Jacobson v. Omaha & C. B. Street R. Co., supra,* and *McCoy v. Omaha & C. B. Street R. Co.*, 104 Neb. 468. In the in-

stant case, it is perfectly clear and beyond dispute that plaintiff was upon the platform when the car started and was either in the act of alighting or about to alight. That starting a car under such circumstances, without warning the passenger, is negligence cannot be gainsaid. The giving of the instruction, therefore, under the circumstances and proof as it existed, was erroneous and was prejudicial to the plaintiff.

We do not deem it necessary to discuss other assigments of error.

For the reasons given, the judgment of the district court is reversed and the cause remanded for further proceedings according to law.

REVERSED.

MARTHA A. EGGELING, ADMINISTRATRIX, APPELLEE, V. CHICAGO, ROCK ISLAND & PACIFIC RAILWAY COMPANY ET AL., APPELLANTS.

FILED DECEMBER 31, 1929. No. 26914.

1. **Negligence**: DUE CARE: PRESUMPTION. The presumption of due care arising out of the natural instinct of self-preservation is not evidence, but a mere rule of law, and obtains only in the absence of direct or circumstantial evidence justifying reasonable inferences one way or another upon that subject; when such evidence is produced the presumption disappears and is not entitled to be considered.
2. **Railroads**: DUTY OF DRIVER AT CROSSING. One driving toward a railroad track with horses and wagon over a road along which exist obstructions which partially shut off a view of an oncoming train must stop, look, and listen before attempting to cross, and if a clear view of sufficient of the track cannot be had by remaining in the wagon, if practicable he should dismount if an adequate view of the track could be obtained only by so doing. (Withdrawn)
3. **Negligence**: INJURY AT RAILROAD CROSSING: GROSS NEGLIGENCE. No recovery can be had by one who suffers harm by crossing a railroad track recklessly or by failing, without reasonable excuse, before crossing to take the precautions which the conditions indicate are available to him. Such conduct is negligence

more than slight which under the comparative negligence law bars recovery.

4. ———: CONTRIBUTORY NEGLIGENCE. Evidence examined, and *held* that, under the circumstances shown, no reasonable excuse for a failure to stop, look, and listen is presented.

APPEAL from the district court for Lancaster county: MASON WHEELER, JUDGE. *Reversed, with directions.*

E. P. Holmes and *Guy C. Chambers*, for appellants.

Burkett, Wilson, Brown & Wilson, contra.

Heard before GOSS, C. J., ROSE, GOOD, THOMPSON, EBERLY and DAY, JJ., and THOMSEN, District Judge.

THOMSEN, District Judge.

Action by Martha A. Eggeling, Administratrix of the Estate of Frank R. Eggeling, deceased, against the Chicago, Rock Island & Pacific Railway Company to recover damages for Eggeling's death occurring at a highway crossing near the town of Rokeby, Nebraska, at about 4 o'clock in the afternoon of July 28, 1927. The engineer was joined as a party defendant. Judgment for plaintiff was entered on a verdict by the jury. The defendants appeal.

Eggeling had been hauling grain to an elevator located on a side-track north and east of the highway crossing. He was familiar with the crossing. His farm was nearby. Rokeby was his trading point. The crossing, which was over the main track of the railroad, was the one customarily used by him to reach the town. On the day of the accident he had hauled five wagon loads of grain over this crossing to the elevator. At the time of the accident Eggeling was returning with an empty wagon from the elevator. The tracks are approximately at right angles to the highway. The highway at this point lies east and west. Eggeling was traveling westward. The train was coming from the north. The collision took place when the wagon was on the tracks of the oncoming train. The horses were in the clear. To one coming from the east the view to the northward, the direction from which the train was coming, was considerably obstructed. The obstructions consisted

of a hedge and weeds about 75 feet east and north of the crossing, the depot about 78 feet north of the crossing and near the tracks, two small buildings north and east of the depot, and a string of freight cars on a side-track east of these buildings. The track curved slightly eastward; but, since the curve began at a point about 325 feet north of the crossing, the curved condition could not enter as a factor in what transpired. To the northwest, part of the tracks could be seen from the highway at various distances ranging from 60 feet to within 22 feet east of the crossing, disclosing the main track at points, respectively, 1,037 feet, 900 feet, 827 feet, and 340 feet north of the crossing. After the 22-foot point, the prospect along the tracks and past the obstructions was an ever widening and lengthening one. Practically undisputed testimony shows that to the north the west rail could be seen from the highway at the following varying distances: 22 feet east of the east rail, 340 feet; 20 feet east, 440 feet; 15 feet east, 780 feet; and along the highway 10 feet from the east rail the west rail of the main track could be seen 1,210 feet north. The accuracy of these distances is strongly attacked by the plaintiff, not so much by testimony, but by a series of mathematical calculations by which results of shorter distances are reached. However, in such calculations the plaintiff failed to consider that the highway describes a slightly acute angle and that the distance along the highway to the track is greater than the distance to the nearest point. Thus, one standing on the highway is actually nearer the track than the distance from the same point to the track along the highway. Even a few inches make a material difference in such calculations. At any rate the camera views furnish a reliable basis of corroboration for the foregoing measurements; and the figures given above may be accepted as substantially correct.

The train was proceeding at 40 miles an hour; Eggeling at 3 miles an hour. Thus, multiplying the speed by 1½, the train was proceeding about 60 feet a second while Eggeling was traveling about 4½ feet a second. It would require 4 seconds for Eggeling to travel 18 feet. So, when

Eggeling was 18 feet from the track, the train was about 240 feet from the crossing. Twenty feet from the crossing it was possible for Eggeling to see up the track 440 feet. At 22 feet away he had a view of 340 feet, a greater distance up the track than the engine would be at that moment. At the speed at which Eggeling was traveling, at all the points where even only momentary views were possible, some portion of the train would have been visible to him. Thus, it is apparent that if Eggeling had looked at any time after passing the 22-foot point, or at the earlier places, he would have seen the train, and that he either did not look or proceeded to cross the tracks in reckless disregard of what he saw.

It may be true that the bell was not rung nor the whistle blown, although evidence to the contrary is substantial; but applying the oft repeated rule that the evidence should be considered in a light most favorable to this appellee, yet Eggeling was bound to do something in his own behalf. He may not, in reckless disregard of any possible negligence of the railroad, rely solely upon its statutory duty, proceed to a place of danger, and expect the train, which cannot turn out or stop instantly, to be an insurer of his safety. If he does nothing for his own security he is negligent, and if the physical facts leave no doubt so that reasonable minds would not differ in that he either proceeded recklessly or failed without reasonable excuse to take the precautions which the conditions indicate were available to him, he is as a matter of law guilty of negligence more than slight, which under our rule of comparative negligence bars a recovery. *Baltimore & O. R. Co. v. Goodman,* 275 U. S. 66; *Rickert v. Union P. R. Co.,* 100 Neb. 305; *Seiffert v. Hines,* 108 Neb. 62; *Haffke v. Missouri P. R. Corporation,* 110 Neb. 125; *Stanley v. Chicago, R. I. & P. R. Co.,* 113 Neb. 280; *Tyson v. Missouri P. R. Corporation,* 113 Neb. 504; *Allen v. Omaha & S. I. R. Co.,* 115 Neb. 221, and annotation in 41 A. L. R. 405.

The day was clear. The crossing and physical surroundings were all familiar to Eggeling. Under the conditions it cannot be said that the obstructions furnished "a reason-

able excuse" for a failure to stop, look, and listen. If, because of his position in the wagon, the time and distance may have been shortened within which to divert his horses from a direct course or to completely stop to avoid a collision after he could have seen the engine, it may have been the part of wisdom and only a reasonable precaution causing him but slight inconvenience to have led his horses by the head across the place of danger. But, regardless of the position he occupied in the wagon, he himself had fully 20 feet and more than 4 seconds in which to see the train approaching and in which to act for his own safety.

"It has long been the law that, when a person goes into a place of danger, known by him to be a dangerous place, he must exercise care for his own safety commensurate with the dangers and incidental perils he encounters in entering the place." *Conrad v. Wheelock,* 24 Fed. (2d) 996.

Complaint is made that the speed of the train was excessive. The speed was stipulated to be 40 miles an hour. The evidence does not show that such speed is unusual at this point, nor has appellee shown that under the conditions such speed is in any sense unlawful. Eggeling's duty of self-protection was not lessened by reason of any excessive speed. His obligation to stop, look, and listen, when any of these or all would have proved beneficial, remained the same although the speed were excessive. "Failure to do so is negligence more than slight in comparison with that of defendant, and will defeat a recovery, even though the whistle was not blown and the bell not rung, *or the speed may have been excessive.*" *Lewis v. Union P. R. Co.,* 118 Neb. 705. See *Moreland v. Chicago & N. W. R. Co.,* 117 Neb. 456; *Askey v. Chicago, B. & Q. R. Co.,* 101 Neb. 266.

Appellee also contends that a strong wind from the south made it impossible or difficult to hear the sound of the approaching train. If true, yet his security was not solely dependent upon his sense of hearing. If his safety were impaired on account of this factor, a fair sense of caution should have impelled him to exercise even greater care in looking and stopping.

In view of all the foregoing, instruction No. 10 requested by defendants and refused by the court should have been given. In this instruction the jury would have been directed to return a verdict for the defendants, which would have been clearly correct in view of the law so strongly established in this state.

"The accident was most unfortunate, but this is a lawsuit; it is governed by rules of law. Judges sitting upon the bench find no pleasure in denying a widow a recovery in a case of this character. It is easy to deny a motion for a directed verdict and let the jury pass upon the facts, and then more or less embarrassing to have to set aside the verdict. Expenses and inconvenience accumulate, and yet eventually any judgment based on such facts as appear here must be reversed. The *Goodman* case, *supra*, was just such a case. The opinion in that case was a clear admonition by the supreme court to trial courts to apply the law." *Conrad v. Wheelock*, 24 Fed. (2d) 996.

In appellee's argument it is intimated that the law places no burden upon the railroad if the failure to stop, look, and listen should in all cases bar recovery, even though the railroad fails to sound any warning as required by section 5377, Comp. St. 1922, as amended by chapter 168, Laws 1927, and even though the injured one had largely relied upon the fulfilment of the duty which such law imposes; that the failure to sound such warning was intended by the legislature to fix liability. However, this court has consistently held ever since 1895 when, in *Chicago, B. & Q. R. Co. v. Metcalf*, 44 Neb. 848, the *effect* of the law was thoroughly considered, that the failure to give the required warning did not establish negligence, but was merely *evidence* of it. If the people were dissatisfied with the state of the law as it exists, it would seem that the legislature would have fixed a different standard; and the very fact that during 35 years since that decision no change has been made in that portion of the law we now consider, would seem to indicate general popular satisfaction. At any rate, the court can only interpret and apply the law, not change it.

Other errors at the trial are claimed by appellants, but the foregoing disposes of the case; therefore such other claimed errors need not be discussed. For the reasons given, the judgment of the district court is reversed, with directions to dismiss.

REVERSED.

PER CURIAM.

The following opinion on motion for rehearing was filed May 2, 1930. *Paragraph of syllabus withdrawn.*

On reargument of this cause, the rule announced in second paragraph of syllabus is withdrawn because unnecessary to a decision of the cause. In all other respects the former opinion is adhered to.

CASES DETERMINED

IN THE

SUPREME COURT OF NEBRASKA

JANUARY TERM, 1930.

IN RE ESTATE OF JOHN J. MAAG.
ALICE M. MAAG, APPELLEE, V. ESTATE OF JOHN J. MAAG, APPELLANT.

FILED JANUARY 8, 1930. No. 26947.

1. **Husband and Wife:** ANTENUPTIAL CONTRACTS. "Antenuptial contracts between persons contemplating matrimony, determining the prospective rights of each in the property of both parties during and after marriage, are not against public policy and are enforceable." *Rieger v. Schaible*, 81 Neb. 33.
2. ———: ———: CONSTRUCTION. "A court of equity, when called upon to consider an antenuptial contract, should examine and construe the instrument in the light of the circumstances surrounding that particular case, and enforce or annul the agreement according to the facts disclosed in the case before it. No arbitrary rule can be laid down which would apply to all antenuptial arrangements." *Rieger v. Schaible*, 81 Neb. 33.
3. ———: ———: VALIDITY. "In view of the close and confidential relation existing between affianced persons, it is the duty of the prospective husband to make a full and fair disclosure of all material facts relating to the amount, character and value of his property, so that the prospective wife may have sufficient knowledge upon which she may exercise her judgment whether she will enter into such a contract." *In re Estate of Enyart*, 100 Neb. 337.
4. ———: ———: ———. "The burden is upon the husband, or his representatives, to show that an antenuptial contract apparently unjust to the wife and fairly procured." *In re Estate of Enyart*, 100 Neb. 337.
5. **Jury.** An appeal from the refusal of the county court to make an allowance out of the estate of a deceased husband for the support of his widow is a law action and is triable to a jury unless a jury be waived.

6. **Husband and Wife: ANTENUPTIAL CONTRACTS: ALLOWANCE TO WIDOW.** Under the facts and circumstances in this case, *held*, that the antenuptial contract in question is not a valid bar to the widow's allowance for her support out of her husband's estate; and the judgment of the district court is affirmed for the reasons set forth in the opinion.

APPEAL from the district court for Douglas county: ALEXANDER C. TROUP, JUDGE. *Affirmed.*

William G. Rutledge and *Gray & Brumbaugh*, for appellant.

Mulfinger & Webb and *Shotwell & Ready, contra.*

Heard before GOSS, C. J., GOOD, THOMPSON, EBERLY and DAY, JJ., and FOSTER and SHEPHERD, District Judges.

GOSS, C. J.

This is an appeal on behalf of the estate of John J. Maag, deceased, from the judgment of the district court. That court reversed the judgment of the county court and directed it to make a reasonable allowance to the widow for her support pending the settlement of the estate.

John J. Maag died November 10, 1927. His will, executed October 10, 1923, was proved and admitted to probate in Douglas county, January 24, 1928. The testator was survived by Alice M. Maag, his widow, who petitioned for the allowance, and by two sons and two daughters, born to him and a former wife, who died long prior to his marriage to the petitioner. The will provided for all of them. The only mention of the petitioner and the only provision for her constituted the third paragraph of the will and is in these words:

"To my wife, Alice M. Maag, if she then be living within six months after my death, the sum of five thousand dollars. This payment to be in lieu of all my wife's statutory rights as my said wife, and as full performance of the agreement between us."

The agreement referred to in the will was an antenuptial contract executed by John J. Maag and petitioner, then Alice M. Smith, in the forenoon of June 2, 1923, before

their marriage later on that same day. More will be stated as to this agreement later in the opinion.

On the same day the will was admitted to probate, Alice M. Maag filed in the county court her written election refusing to accept the provision made for her in the will and electing, in lieu thereof, to take under and by virtue of the laws of Nebraska; and on the same day she filed in the county court a petition asking that court to make her an allowance of $150 a month for her support as the widow. Thereupon the executor filed his answer and objections to the petition, setting up the antenuptial agreement entered into by the petitioner, by which it was alleged she bound herself to take $5,000 upon testator's death and to waive all other claims against his estate. Completed issues were made by her reply, which particularly raised the issue of lack of fair disclosure of the value of the property of John J. Maag and of the nature, character and value of the estate she was relinquishing. On a hearing the county court found that a full and fair disclosure of the extent and value of both his real and personal property was made by John J. Maag to her prior to the execution of the antenuptial agreement, and that she was fully capable and had the ability and opportunity to determine the value of his estate and did so determine the extent and value thereof prior to the execution of the agreement; that the agreement was a bar to said widow's participation in the distribution of the estate, except as to the sum provided in the will; that she was estopped from making any further claims to the proceeds of the estate, and that the terms of the antenuptial agreement should be upheld and enforced. The order of the county court, after making the findings above abstracted, concluded with the following judgment:

"It is therefore considered, ordered, adjudged and decreed that said antenuptial agreement is a valid agreement; that the terms of said agreement operate as a bar to and prevent the petitioner, Alice M. Maag, from participating as the widow of said John J. Maag in any distributive share of said estate, other than that named in said antenuptial agreement, and as provided for by decedent's will, and the

petition of said widow for an allowance of said estate should be and is hereby overruled."

In the district court, after part of the reply was stricken as presenting an issue not pleaded in the county court, the issues were pleaded as they were in the county court. The reply concluded with a prayer for the "allowance asked for in the petitioner's original petition, and for such other and further relief as to the court may appear she may be justly entitled."

The case was classified as a law case, was placed upon the law docket, and when it was reached for trial, "a trial by jury having been waived by agreement of parties," the cause was tried before the late Alexander C. Troup, district judge, and submitted to the court on all questions of law and fact. The court found generally and specifically for Alice M. Maag and against the executor and estate. The final judgment particularly found that John J. Maag did not make to the petitioner the full and fair disclosure of his property, as required by law, prior to the execution by her of the antenuptial agreement, "and that said alleged antenuptial contract has never been, nor is it now, a valid, binding, or enforceable contract as against said petitioner." The judgment thereupon adjudged the contract invalid, declared that petitioner was entitled to all the rights, as a surviving widow, as though said contract had never been executed, reversed the judgment of the county court and remanded the cause, with direction to allow a reasonable sum to the petitioner for her support pending the settlement of the estate. A motion for new trial was duly filed and overruled. The record contains a written opinion by the district judge filed the day the final judgment was rendered by him.

In the county court and in the district court, what the petitioner was seeking was an allowance provided by law for the support of the widow pending the settlement of the deceased husband's estate; in both courts the executor, acting for the estate, was seeking to have such allowance defeated. The defense in both courts was that she had waived

such allowance and had barred herself from it, by virtue of the contract she had made prior to the marriage.

Alice M. Smith had two children at the time she signed the antenuptial agreement and married John J. Maag. The original agreement is in the bill of exceptions. Date and all, it is entirely typewritten, except the signatures. Omitting the certificate of acknowledgment, which is in the usual real estate form, it is as follows:

"Antenuptial Agreement.

"This agreement made and entered into this 2d day of June, 1923, by and between John J. Maag, of Otoe county, Nebraska, aged fifty-eight years, and Alice M. Smith, of Douglas county, Nebraska, aged forty-five years, witnesseth: That, whereas, a marriage is contemplated by and between the parties hereto, and the object of the pecuniary condition and situation, their prospects and desires and mutual rights and obligations, having been fully considered, they hereby mutually covenant and agree, each with the other, and to which they respectively bind themselves, their heirs, executors, and administrators as follows:

"That the said John J. Maag, in consideration of the promise of the said Alice M. Smith, to marry him, and of the consummation of the said proposed marriage, and of her agreements herein contained, covenants and agrees that he will, upon his decease, pay or cause to be paid, or provide that there shall be paid, to her, if she is then living, the sum of five thousand dollars in good and lawful money of the United States, within six months after his death; and as a further consideration thereof, the said John J. Maag, hereby waives, disclaims, and releases, all right, title and interest in and to any and all real and personal property owned or possessed by the said Alice M. Smith at the time of said marriage, or may hereafter acquire by any means whatsoever, and in which he may or might lawfully and rightfully acquire any title or interest therein or thereto by virtue of said marriage. Said John J. Maag acknowledges that he knows said Alice M. Smith

is the owner of a residence property consisting of a house and lot in Omaha, Nebraska.

"And the said Alice M. Smith, in consideration of the said five thousand dollars and of the other covenants and agreements above mentioned, hereby waives, disclaims, and releases all right, title, and interest, in and to any and all of the real and personal property owned or possessed by the said John J. Maag, at the time of said marriage, or may hereafter acquire by any means whatsoever, and in which she may or might lawfully and rightfully acquire any title or interest therein or thereto by virtue of said marriage. Said Alice M. Smith acknowledges that she knows said John J. Maag is the owner of four hundred acres of land in Otoe county, Nebraska, and a residence property consisting of a house and the north 70 feet of lots 1, 2, 3, and 4, in block 20, Prairie City addition to Nebraska City, Nebraska, and a small amount of personal property.

"The intention being hereby to leave the absolute disposal of said real and personal property now owned or hereafter acquired by either of them, so that at the death of said parties, all of the property of said parties, respectively, shall descend, or be disposed of by will, to his or her lawful heirs, legatees or devisees, released and acquitted of all claims of dower, curtesy, homestead, or other interest of any kind or nature, that either might have had under the laws of Nebraska.

"In witness whereof, the parties hereto have hereunto set their hands the day and year first above written.

"John J. Maag.
"Alice M. Smith.

"In Presence of C. A. Tracy.
"Stephen Hansen."

The instrument was acknowledged June 2, 1923, before C. A. Tracy, a notary. Endorsements show it was filed in the office of the register of deeds of Douglas county at 11:55 a. m. the same day and in the office of the register of deeds of Otoe county July 11, 1923, at 1:15 p. m.

Antenuptial contracts are recognized by statute. "A

man or woman may also bar his or her right to inherit part or all of the lands of his or her husband or wife by a contract made in lieu thereof before marriage. Said contract shall be in writing signed by both of the parties to such marriage and acknowledged in the manner required by law for the conveyance of real estate, or executed in conformity with the laws of the place where made." Comp. St. 1922, sec. 1225.

Before entering upon the further relation of the facts and the law it may be well to state some general provisions of the law as settled in this jurisdiction.

"Antenuptial contracts between persons contemplating matrimony, determining the prospective rights of each in the property of both parties during and after marriage, are not against public policy and are enforceable;" and "In this respect, however, and before passing from this branch of the case, it might be well to state that a court of equity, when called upon to consider an antenuptial contract, should examine and construe the instrument in the light of the circumstances surrounding that particular case, and enforce or annul the agreement according to the facts disclosed in the case before it. No arbitrary rule can be laid down which would apply to all antenuptial arrangements." *Rieger v. Schaible*, 81 Neb. 33, 57.

"The burden is upon the husband, or his representatives, to show that an antenuptial contract apparently unjust to the wife was fairly procured;" and "In view of the close and confidential relation existing between affianced persons, it is the duty of the prospective husband to make a full and fair disclosure of all material facts relating to the amount, character and value of his property, so that the prospective wife may have sufficient knowledge upon which she may exercise her judgment whether she will enter into such a contract." *In re Estate of Enyart*, 100 Neb. 337.

A perusal of the antenuptial agreement shows that nowhere does it purport to disclose the value of the estate owned by either party. Nor does the evidence show that John J. Maag told Alice M. Smith at the time the contract was entered into the character or value of his property,

or that she then had knowledge of its character and value. The circumstances leading up to and surrounding the execution of that instrument, as shown by the evidence, are briefly sketched as follows: They first became acquainted in the late summer or early fall of 1922, and at Omaha, on Decoration Day, May 30, 1923, talk of marriage between them ripened into a definite agreement to be married on the following Saturday, June 2, 1923; she had never been in Otoe county, and while he had told her he owned 400 acres of land in that county he had never made any statement to her as to its location, description or value. On May 31, 1923, Mr. Maag left Omaha for his home in Otoe county, but he returned to Omaha on the evening of June 1 and telephoned Mrs. Smith from his hotel, asking her to come to the hotel to talk over a matter of business. She invited him to come out to the house and stated it was raining hard. He said he did not want to talk where so many were around and sent a taxicab for her. She went to the hotel, met him in the lobby, and went with him to his room, where they sat down on the side of the bed. She testified that he then took a paper out of his pocket and said: "I was down to Auburn this morning and had a little paper fixed up here I want to talk to you about. * * * This is all for your protection, if anything would happen to me; if I should be taken away, you will have a home and plenty to take care of you as long as you live. * * * I don't want you to think if you sign this I am not going to take care of you as long as you live, because I am. It is just for your protection so the children couldn't take everything." She testified he never said how much it was and she did not ask him, that she did not read it, nor did he furnish her a copy of it, that he nor any one else advised her what she would be entitled to as his widow if she survived him; that he took her home from the hotel that night, came after her the next morning and took her down to the courthouse, where the antenuptial contract was signed, acknowledged and filed in the office of the register of deeds of Douglas county. She testified that she did not read the instrument, nor was it read to her. The notary,

who was a deputy register of deeds and who took the acknowledgment and was one of the subscribing witnesses, testified, in substance, that because it was an unusual instrument he asked them both if they were familiar with the contents and they both answered in the affirmative. The filing was concluded at five minutes before noon; the parties went to Fremont, arriving about 4 p. m. and were there married at 7 p. m. that day.

While there was some evidence tending to impeach portions of the testimony of the petitioner, yet we find the ultimate facts are substantially as we have recited them in an endeavor to draw a fair picture of what we see in the record. Even if we were to conclude that Alice M. Smith actually read the instrument before it was executed, or that she answered the notary, when acknowledging it, that she knew its contents, yet those things, of themselves, would fall short of proving that her prospective spouse made a full and fair disclosure of, or that she knew, the extent, character and value of his holdings.

Neither spouse being the parent of the children of the other would take more than one-fourth of the real or personal estate of the other if that other died intestate. Comp. St. 1922, secs. 1220, 1222. The probate proceedings of John J. Maag had not gone far enough to show the exact value of the estate in the county court, but the inventory showed upwards of $60,000. There was evidence on the trial in the district court showing estimates ranging from $65,000 to $84,000, depending on the side producing the estimate. The petitioner if compelled to accept the $5,000 under the contract and will, rather than to be allowed to take her election under the statute, would forego at least the difference between say $16,000 and $5,000. It may be remarked that the evidence shows no appreciable change in the estate between the marriage and death. So there is a great disparity between the amount provided in the antenuptial contract and the amount the law would allow the widow. This amount is so grossly disproportionate to the interest the law would give the petitioner as to lead to the conclusion that, whether intentional or otherwise, it constituted

a legal fraud upon the petitioner. We say this without any intention of charging the deceased with active or intentional fraud. As shown in what we have hereinbefore quoted from *In re Estate of Enyart, supra,* the duty to make a fair disclosure of the amount, character and value of his property was an imperative one, cast by the law as a burden upon John J. Maag and his representatives before the validity of the antenuptial agreement can be established as a defense to the statutory right of a widow to take an allowance for support out of his estate. The same principles have been reiterated in *Stahl v. Stahl,* 115 Neb. 882, and in *In re Estate of Waller,* 116 Neb. 352.

It is argued by the executor that the petitioner, if not advised of the value of her prospective husband's estate or if ignorant of its character, extent and value, was charged with the duty of ascertaining it and yet did nothing in respect thereof. The cases we have cited from our own state show that this burden was not hers. The trial judge in his memorandum opinion succinctly covered that point with a case from another jurisdiction when he said: "But if any default or lack of duty should be charged to petitioner on that account, the law's answer to that is: 'The burden (duty) was not upon her to inquire but upon him to inform.' *Denison v. Dawes,* 121 Me. 402, and cases cited."

This case was a law case triable to a jury. *Sheedy v. Sheedy,* 36 Neb. 373. The executor now claims that it was converted by her reply (in the district court) to an issue in equity. It would seem a complete answer to this to say that the record shows that the parties waived a trial by jury. We do not find any place in the record where the question that it was an equity trial was discussed or referred to. Moreover, the issue in the county court seems to have been whether or not the widow was entitled to an allowance. Incidentally it depended as a matter of evidence upon whether she had waived it by her antenuptial contract, and the county court found that she had done so because the contract was valid. In the district court the issues had to be the same and were so; and again the con-

tract was pleaded as a defense. The district court held that the contract was not entered into in the circumstances required by law and was invalid and therefore not a bar to her allowance. It is true the petitioner in her reply in the district court prayed for "such other and further relief," but this could not convert a law case into an equity case. It was mere surplusage. While we are of the opinion it is purely a law case, yet we have no hesitancy in saying that if it were an equity case we would still, having gone very carefully into all the evidence, have found the ultimate issuable facts the same as did the trial judge.

In discussing such contracts, Judge Letton in the opinion in the *Enyart* case said: "In fact, most courts now support antenuptial contracts if fairly made. Such instruments frequently tend to peace and happiness by settling questions concerning rights of property, which, especially in the case of marriage of people in later life having children of a former marriage, often furnish grounds of irritation and friction which may defeat the very purpose of the union." To this philosophy, so aptly phrased, we think it not out of place to add a few observations, derived from a realization that there is an increasing number of those adopting this method of providing in advance of marriage for the distribution of estates after death. And yet such lay parties and, perhaps, to a lesser extent, the members of the profession who are sometimes, but not always, consulted, do not in all instances realize, or at least put into practice, the elements that form the basis of a valid antenuptial contract. The ideal contract of that nature would be preceded not only by a full and frank disclosure of every item of real and personal property but by an examination to discover and perpetuate the evidence of its quantity, character and value. If this were done and these things were set forth in the instrument itself, together with evidence that the parties knew what relation the provisions of the contract bore to the statutory rules of distribution, there would be less opportunity for litigation by a surviving spouse. If, in addition to what has been suggested, frank effort would be made by both parties to

secure and preserve evidence of third parties as to all the circumstances of the disclosure, the chances for future disagreement would be reduced to a minimum. It could not then be said, as it was said in *White v. White*, 112 Neb. 850, and as appears in the instant case: "She was too much hurried into it." An antenuptial contract means what the words signify. It has to be entered into before marriage. If valid, it cannot be changed after marriage. Whether valid or invalid, if entered into in haste it is often repented at leisure, sometimes by one party, sometimes, as in case of divorce, by both.

We believe the judgment of the district court is the proper one on the particular facts and the law of this case, and it is, therefore,

AFFIRMED.

Note—Husband and Wife, 30 C. J. 626 n. 22, 643 n. 43, 648 n. 8, 668 n. 65, 669 n. 72; 9 L. R. A. n. s. 953; 13 R. C. L. 1036; 17 L. R. A. n. s. 866; 13 R. C. L. 1037.

JOHN WOLLMER, APPELLEE, V. JAMES WOOD ET AL.: THEODORE JOHNSON ET AL., APPELLANTS: ROY B. CARLBERG, CROSS-PETITIONER AND APPELLEE.

FILED JANUARY 8, 1930. No. 26776.

1. **Judicial Sales: CONFIRMATION: EXEMPTIONS.** The right of exemption of real property from the laws of the United States is not proper for consideration upon proceedings for the confirmation of a judicial sale of such real estate on which it is alleged the right of exemption has been imposed.
2. ———: ———: ———: **QUIETING TITLE.** The motion to confirm a sheriff's sale cannot be resisted on the ground that the land sold is exempt from the levy and lien of the judgment involved, and an attempt to resist it on that ground will not bar a subsequent action to remove the cloud caused by such sheriff's deed.
3. **Indians: ALLOTMENT OF LAND: ALIENATION.** The act of Congress of 1882 allotting lands to the Omaha Indians, the act of 1906, and the act of 1907, construed and *held* to be *in pari materia*, and to authorize, upon consent of the secretary of the interior, an Indian holding such allotment to sell and transfer a

full, complete and perfect title to his grantee of the real estate or any part thereof constituting such allotment, which conveyance when so made is effective to convey full title to the land or interest so sold "the same as if the fee simple patent had been issued to the allottee."

4. ———: ———: ———: LIABILITY FOR DEBTS. As a sale and conveyance by an Indian allottee made after receipt of the final fee simple patent from the government of the United States was effective to vest in his grantee full, complete and perfect title of the real estate so conveyed, forever exempt from the liability of debts of such allottee and patentee created before such patent was issued, and such land in the hands of a subsequent grantee is not exempt by federal law from payment of debts of the latter incurred prior to the issuance of the patent; so the identical result is accomplished by the execution of the conveyance provided for by the act of 1907 when approved by the secretary of the interior as therein provided.

5. ———: ———: ———: ———. *Held*, under the facts in the instant case, the title thus conveyed to James Wood by David and Daabe Preston was not exempted by the federal law from the payments of the debts of the former incurred prior to the approval and delivery of such deed.

APPEAL from the district court for Thurston county: MARK J. RYAN, JUDGE. *Reversed, with directions.*

Stason & Knoepfler, for appellants.

Saxton & Hammes, for appellee Wollmer.

Roy B. Carlberg, pro se.

Heard before ROSE, DEAN, GOOD, THOMPSON, EBERLY and DAY, JJ., and REDICK, District Judge.

EBERLY, J.

Appellee, plaintiff in the court below, instituted action to secure the foreclosure of a certain real estate mortgage and the sale of certain real estate described therein situated in Thurston county, Nebraska, against the defendants who are the appellants here, and with them impleaded James Wood and Susan S. Wood. This petition of appellee contains allegations common to foreclosure proceedings and also certain statements setting forth that the defendant Theodore Johnson claimed to own the premises described

by reason of certain proceedings based upon a judgment entered in the district court for Thurston county, Nebraska, on November 4, 1920, in favor of Theodore Johnson and against the defendants James Wood and Susan S. Wood upon an obligation which was incurred by the latter at and prior to the 12th day of September, 1919; that James Wood and his wife were Omaha Indians, and that the land in controversy at the time Wood became possessed of the title was not subject to the lien of the Johnson judgment, nor subject to be sold thereunder, and that the proceedings so far as the levy and sale were concerned, upon which Johnson's rights to the premises were based, were in truth and in fact void. The appellants here, defendants in the district court, admit the execution of the mortgages in suit; and the due rendition of the judgment of the defendant Johnson is not denied by any of the parties. The defendant Roy B. Carlberg is likewise the owner of a note and mortgage covering the same land executed by Wood and wife, the priority of which is junior to that of appellee Wollmer. This mortgage was set up by a cross-petition and the questions presented by this pleading are identical with those presented by the pleadings of Wollmer, and a like judgment was entered.

The real issue in the case is the right of Johnson to levy his judgment on and satisfy the same out of the lands described in appellees' mortgages. There was a trial of the issues to the district court for Thurston county which found in favor of the appellees, adjudged the lands exempt from the lien of appellants' judgment, and that the title based upon such levy and sale to the premises upon which appellants predicated their defense was therefore void, and decree of foreclosure and sale was entered in favor of the appellees as prayed. From this adjudication defendants, Theodore Johnson, Clara E. Johnson, and H. L. Drenguis, have appealed.

The uncontradicted evidence in the record discloses that David and Daabe Preston were Omaha Indians, and sustained to each other the relation of husband and wife. Each was an allottee of the government under the act of

1882 allotting lands to Omaha Indians, and both were past eighty years of age. They desired to secure a distribution of their real estate. For this purpose David Preston executed a will devising the allotments received by him. Contemporaneous with this in disposing of her allotment, Daabe Preston, together with David Preston, her husband, executed a deed which conveyed to their grandson, James Wood, the following described premises situated in Thurston county, Nebraska: Southwest quarter of the northeast quarter of section 30, township 25, north of range 9, east of the sixth principal meridian. This instrument, termed "Deed Noncompetent Indian Land," bears date March 31, 1917. However, there was no delivery of this conveyance made at that time, nor did the representatives of the federal government approve its terms until the 4th day of February, 1921. On that day this conveyance was approved by John Barton Payne, secretary of the interior.

It is further disclosed by the record that James Wood became indebted to Theodore Johnson in the sum of $2,500 on or prior to September 12, 1919. On that date this indebtedness was merged into a promissory note which Wood and wife then made and delivered to Johnson. Judgment was duly entered in the district court for Thurston county on this note November 4, 1920, for the sum of $2,785 with interest at 10 per cent. and costs of suit taxed at $17.75. The conveyance of the land in suit made by Preston and wife to James Wood, and which was approved on the 4th day of February, 1921, was recorded as provided by law in the land office in Washington, D. C., on the day of its approval, and recorded in Thurston county, Nebraska, on the 15th day of October, 1921. Appellee's note and mortgage were duly executed and delivered by James Wood and Susan S. Wood, his wife, and this mortgage was duly recorded in Thurston county on the 23d day of November, 1921. Thereafter an execution was issued on the Johnson judgment and was levied on the land described in the mortgage on the 29th day of March, 1923. In due time this land was sold under said levy to Johnson and the sale thereof duly confirmed by the district court for Thurston

county. This levy and sale the district court for Thurston county, in this proceeding, adjudged was void and conveyed no title to Johnson for the reason that the lands upon which the levy was made were "Indian lands" and not subject to the lien of the Johnson judgment because of the provisions of the federal law pertaining thereto.

On this record the appellants now present two propositions, viz.: First. Because of certain proceedings had in the district court for Thurston county, Nebraska, which ripened into the confirmation of the execution sale herein referred to, the appellees are bound by the decree of confirmation and especially by the finding therein "that said premises at the time of the levy and execution were the property of the defendant James Wood and subject to such levy on execution and sale." Second. That, even though this contention be denied, still the land in question was subject to the lien of appellants' judgment at the time of the levy and sale, and that the title of appellants based thereon is superior to the lien of appellees' mortgages.

The question first presented is essentially one of practice under the Nebraska Code. It may be conceded that it was the right of appellants, in view of the conditions which obtained at the time of the issuance and levy of the execution on their judgment upon the land in question, to have had all conflicting claims to the premises determined so that any purchaser at the sale would have been fully advised as to what was secured to him by his purchase. Under the practice which prevails in this jurisdiction this result would have been obtained by the issuance, service and return of the execution *nulla bona*, and the filing of a petition in the nature of a creditor's bill to which all persons in interest would be made parties setting forth the facts and tendering issues thereon. This would have secured to each person in interest his day in court with an opportunity to meet the claims of the plaintiffs and present their defenses thereto. *First Nat. Bank of Plattsmouth v. Gibson*, 60 Neb. 767. It is plain, however, that this course was not followed. Instead thereof the appellants desire to obtain the fruits of action which does not appear to have

been authorized either by the terms of our statute or by the established practice of our courts. Indeed the statute relative to the confirmation of judicial sales has no requirement as to notice being served on the judgment debtors or parties in interest in the suit, and the only requirement of notice in such cases pertains to confirmation had at chambers. It appears that the sale now under consideration was confirmed on one of the days of a regular term of court. And it may be further said that, in the regular course of judicial procedure, the only matter settled and adjudicated in the proceedings and order of confirmation of a judicial sale is that as to the proceedings of the sheriff and those acting under and with him in the levy, appraisement, advertising, making and returning of the sale. The questions as to the exempt character of the lands levied upon are not proper to present before the district court in considering objections to confirmation of the judicial sales of real estate. This court has held that at chambers a judge may confirm judicial sales, and this determination is hardly consistent with the idea that at such hearing there may be an adjudication of rights ordinarily determinable only by courts in the exercise of their regular jurisdiction as such. *Schribar v. Platt*, 19 Neb. 625; *Best v. Zutavern*, 53 Neb. 619; *Best v. Grist*, 1 Neb. (Unof.) 812; *Kaley v. Eselin*, 108 Neb. 544. In *Kaley v. Eselin, supra*, this court held:

"The homestead right of exemption of real property under the laws of this state is not a proper subject for consideration upon proceedings for the confirmation of a sale of the alleged homestead on execution.

"The motion to confirm a sheriff's sale cannot be resisted on the ground that the land sold is the homestead of the judgment debtor; and an attempt to resist it on that ground will not bar a subsequent action to remove the cloud caused by such sheriff's deed."

This principle is applicable to the situation before us and is controlling. It follows that none of the parties to this confirmation proceeding are prevented thereby from establishing the true nature of the lands, which are the sub-

ject of this action, in a subsequent proper proceeding to determine their real character as to whether subject to levy or not. Appellants' first proposition must therefore be resolved against them.

The controlling question is presented by appellants' second contention, which is that when the title was vested in James Wood it became subject to the lien of appellants' judgment at a time which made appellants' judgment senior and superior to appellees' mortgages. The federal statute which furnishes the source of this title is the act of 1882, 22 St. at Large, ch. 434, p. 341. This act, we take judicial notice, was continued in full force and effect by executive proclamations and was in full force at the time of the transactions detailed in this record, except as to amendments thereto properly made by congress. In this connection appellees contend that it was amended by the act of May 8, 1906, 34 St. at Large, pt. 1, ch. 2348, p. 182, of which the applicable provisions are the following:

"The secretary of the interior may, in his discretion, and he is hereby authorized, whenever he shall be satisfied that any Indian allottee is competent and capable of managing his or her affairs at any time to cause to be issued to such allottee a patent in fee simple, and thereafter all restrictions as to the sale, incumbrance, or taxation of said land shall be removed and said land shall not be liable to the satisfaction of any debt contracted prior to the issuing of such patent."

In addition to this it appears that a subsequent act of congress, passed March 1, 1907, 34 St. at Large, pt. 1, ch. 2285, p. 1018, is as follows:

"That any noncompetent Indian to whom a patent containing restrictions against alienation has been issued for an allotment of land in severalty, under any law or treaty, or who may have an interest in any allotment by inheritance, may sell or convey all or any part of such allotment or such inherited interest on such terms and conditions and under such rules and regulations as the secretary of the interior may prescribe, and the proceeds derived therefrom shall be used for the benefit of the allottee or heir so dis-

posing of his land or interest, under the supervision of the commissioner of Indian affairs; and any conveyance made hereunder and approved by the secretary of the interior shall convey full title to the land or interest so sold, the same as if fee simple patent had been issued to the allottee."

It is the contention of the appellants that the matters in suit herein are determined by the provisions of the act of 1907, while the appellees rely upon the act of 1906 to sustain their position.

As a necessary rule of construction it may also be said: "From the time of *Worcester v. Georgia,* 6 Pet. (U. S.) *515, *582, down to *United States v. Celestine,* 215 U. S. 278, it has been the rule of all courts to construe doubtful legislation in favor of the Indian." *Rider v. LaClair,* 77 Wash. 488.

It is also undoubtedly true that the source of all powers exercisable by the general government is the legislation duly enacted by the legislative branch thereof. The executive agencies may exercise only the powers thus created and vested in them, including such as may be necessarily implied. The warrant of authority, however, is to be found in the express terms of the statutes, which they must comply with and of which the world must take notice in dealing with these subjects of legislation. Thus it has been declared: "It is the intention expressed in a statute, and that alone, to which the courts may lawfully give effect. They may not assume or presume purposes and intentions that the terms of the statute do not indicate and then enact or expunge provisions to accomplish these supposed intentions." *Brun v. Mann,* 151 Fed. 145, 157. In the case of *United States v. Hemmer,* 195 Fed. 790, 801, it was held: "Even though the patent in this case had failed to show that Taylor was an Indian, and contained no limitation whatever upon alienation, the act of the executive officers of the United States issuing the patent without condition or limitation (if limitations should have been imposed upon alienation under the then existing provisions of the acts of congress) could not affect such limitation prescribed by

congress, and the purchasers from Taylor, the Indian, were chargeable with knowledge of the limitations imposed upon his title by the acts of congress. *Taylor v. Brown*, 5 Dak. 335, Id., 147 U. S. 640, 13 Sup. Ct. 549, 37 L. Ed. 313; *Eells v. Ross*, 64 Fed., 417, 12 C. C. A. 205. The rule of *caveat emptor* applies to these defendants taking this contract, assignment of the contract, judgment, and tax liens. They are charged with notice, not only of all the facts appearing on the face of the patent, but were also bound by actual as well as constructive knowledge and notice of any defect or mistake in the patent, which was obvious or which might have been known by proper diligence. *Wissler v. Craig's Adm'r*, 80 Va. 22; *Burwell's Adm'rs v. Fauber*, 62 Va. 446; *Tilley v. Bridges*, 105 Ill. 336."

And without further discussion, it may be said that both parties to the litigation agree that the restrictions attempted to be imposed by the secretary of the interior in the approval of this conveyance to Wood are unauthorized by the terms of the statutes applicable and are wholly void.

But it is insisted on the part of the appellees that the following provision of the act of 1906 precludes the attachment of the lien of appellants' judgment to the land in controversy and prevents sale thereunder, viz., "And said land shall not be liable to the satisfaction of any debt contracted prior to the issuing of such patent."

It would seem, however, that when the three acts of congress referred to herein are construed as being *in pari materia* some force and effect must be given to the legislation of 1907. This is at least the last expression of the legislative will. True, the act of 1906 provides: "Said land shall not be liable to the satisfaction of any debt contracted prior to the issuing of such patent." But it will be noted that this exemption is limited to the taker under the final patent which, it was contemplated, would terminate the trust period and vest in the allottee or in the allottee's heir a full and complete title relieved of all restrictions. There was a similar provision applicable to homestead titles granted by the government under the act of May 20, 1862, entitled "An act to secure homesteads

to actual settlers on the public domain." Section 4 of said act (U. S. Rev. St. sec. 2296) declares: "No lands acquired under the provisions of this chapter shall in any event become liable to the satisfaction of any debt contracted prior to the issuing of the patent therefor." This language we construed to be in legal effect that, "Although lands acquired as a government homestead are forever exempt from liability for the debts of the patentee created before the patent was issued, such lands in the hands of a subsequent owner are not exempt by the federal homestead law from the payment of the debts of the latter incurred prior to the issuance of the patent." *Duell v. Potter*, 51 Neb. 241.

True, under the terms of the Omaha allotting act of 1882 the issuance of a patent in fee simple by the government is expressly made a condition to the termination of the restrictions imposed by that act. Even so, after receipt of final patent it is plain that the patentee had unlimited right to sell and transfer and, while the fee simple title remained in him, it was exempt from all indebtedness by him previously incurred. But, notwithstanding these provisions, the legislative will, as expressed in the act of 1907, was that additional powers should be conferred which are enumerated in the act, and, as a part thereof, further declares as a result of the exercise of the additional powers so conferred that "any conveyance made hereunder and approved by the secretary of the interior shall convey full title to the land or interest so sold, the same as if fee simple patent had been issued to the allottee."

Applying this language to the situation disclosed in the present case: It is thought that the terms of the act of 1907 fairly disclose the legislative intent that a conveyance by an allottee, who had prior thereto received his final patent, vested in the transferee a full and complete title forever exempt from liability for the debts of the patentee created before the patent was issued. But this exemption extended no further. The lands in the hands of the transferee were subject to his indebtedness without reference to the date of its creation. So the approval by the secre-

tary of the interior of the "Deed Noncompetent Indian Land" of such allottee, in legal effect, vested in the grantee of such deed a full and complete title relieved of all indebtedness of the grantor incurred by him prior to such approval; and likewise vested in the grantee named a full and complete title without restrictions as to alienation and without federal exemption as to such grantee's debts. Under the terms of the statute, whether the title be taken under such approved deed by a white citizen or by a red can make no difference. The controlling words vested in the grantee the same title, irrespective of blood or condition, and do not create or continue in the grantee any right of exemption personal to him whatsoever. Under these circumstances the rule applicable to appellants' judgment was announced by this court in *Lessert & Steele v. Sieberling & Co.*, 59 Neb. 309, as follows: "Real property, purchased by a judgment debtor subsequent to the rendition of judgment against him, is subject to the lien of such judgment as soon as the title vests in the debtor. Purchasers from such judgment debtor, who have actual or constructive notice of the lien, take the property charged with the lien."

This necessitates the conclusion that on the 4th day of February, 1921, the date of the approval by the secretary of the interior of the "Deed Noncompetent Indian Land" and the delivery thereof, a full, complete and perfect title was vested in James Wood which was subject to the lien of any existing judgment against him irrespective of the date of its entry or the date of the creation of the indebtedness upon which it was based. It therefore follows that the title vested in the appellants by the sale under their judgment lien was the full, complete and perfect title of James Wood, the lien of appellees' mortgages being subject to the lien of appellants' judgment. The execution sale thereunder vested in the appellants, purchasers thereat, the full, complete and perfect title to the premises wholly relieved of the lien of the mortgages in suit.

The action of the district court in the premises is erroneous and the judgment is reversed and the cause re-

manded, with directions to the district court to enter a decree in harmony with this opinion quieting the title in the appellants as prayed for in their answers.

REVERSED.

SPLITTGERBER BROTHERS ET AL., APPELLEES, V. SKINNER PACKING COMPANY, APPELLANT.

FILED JANUARY 8, 1930. No. 26714.

1. **Trial**: CONDUCT OF COUNSEL. Upon the trial of issues of fact to a jury, counsel should not make declarations of fact during the introduction of evidence, nor repeat incompetent questions to which objections have been sustained, nor make comment on the evidence or witnesses until the time for argument has arrived, and such conduct is error.
2. **Corporations**: VALUATION OF ASSETS: DIVIDENDS. "If the assets of a corporation are valued honestly and fairly in view of all the facts known at the time of the declaration, a dividend is not rendered unlawful by the fact that such assets subsequently prove to be worth less than the valuation placed upon them." 14 C. J. 804.
3. ———: NET PROFITS. "The term 'net profits' or 'surplus profits' may be defined as what remains after deducting from the present value of all the assets of a corporation the amount of all liabilities, including capital stock, in other words, that which remains as the clear gain of a corporation, after deducting from its income all expenses incurred and losses sustained in the conduct and prosecution of its business." 14 C. J. 802.
4. ———: SALE OF STOCK: REPRESENTATIONS BY AGENTS. A purchaser of shares of stock in a corporation recently organized and then being promoted is not justified in relying upon a statement of the value of the stock made by a stock salesman, where the purchaser knew the value of the stock was problematical and depended upon the future success of the corporation's business.
5. **Trial**: INSTRUCTIONS: ESTOPPEL. "One who tenders an instruction which is given, which assumes the existence of evidence to establish an issuable fact in the case, cannot afterwards be heard to assert that there was no evidence received tending to prove such fact." *American Fire Ins. Co. v. Landfare*, 56 Neb. 482.

APPEAL from the district court for Douglas county: ARTHUR C. WAKELEY, JUDGE. *Reversed.*

Ritchie, Chase, Canaday & Swenson, for appellant.

G. P. North and *F. H. Pollock, contra.*

Heard before ROSE, DEAN, GOOD and DAY, JJ., and RAPER and REDICK, District Judges.

RAPER, District Judge.

Splittgerber Brothers, a partnership, appellees, brought this action against the Skinner Packing Company, to recover the purchase price of five sales of preferred stock in the appellant company, which appellees allege was induced by false representation. The petition sets out six causes of action. The first is based on a sale of 20 shares on June 18, 1918, for which plaintiffs paid $2,000; the second count related to purchase of 20 shares on May 16, 1919, for $2,500; the third count was found to be an error and was abandoned; the fourth count is on a purchase of 60 shares on May 27, 1919; the fifth count is on a purchase of 100 shares on July 31, 1919, for $7,500, one-half paid for in cash and one-half on note, a renewal of which was unpaid; the sixth is on a purchase of 50 shares on August 22, 1919, for $6,250, one-half of which was paid for in cash and the remainder by note, renewals of which were unpaid. There was trial to a jury, which returned a verdict for plaintiffs on the five causes of action for the amount of the purchase price of each purchase with interest, less the amounts of the notes that were unpaid. A separate finding was made on each count.

The alleged false representations made by one L. B. Hughes, agent for the appellant, on the first cause of action were: (a) That the stock in the Skinner Packing Company was worth and of the actual value of $100 a share; (b) that the said company at the rate it was making profits was making a sufficient sum to pay 30 per cent. per annum to each stockholder; (c) that Paul and Lloyd Skinner had invested $400,000 in cash of their own money in the company; and (d) that the agents (stock salesmen) were working on a salary but not on commissions. The court in its instructions, because of lack of evidence, took from

the jury all these allegations except the first. As to the allegation concerning value of the stock, there was no evidence to prove the stock was not worth $100 a share, so there was no evidence to support the verdict on the first cause of action. Bernard Splittgerber was the only witness who testified to the representations on all the different sales. He was informed that the company had been recently organized, and that stock would have to be sold to finance the building and equipping of a large meat packing plant, and that very little had been done in executing the work except to purchase land and doing some grading, and he must have known that the value was problematical, and no one could foresee definitely the outcome, or the success of the venture. Under those circumstances he was not justified in relying upon a representation that the stock was of the value of $100 a share. It follows that the first cause of action should be dismissed.

On the four causes of action for the 1919 sales, plaintiffs in their petition allege certain false representations made by defendant's stock salesman, of which the court submitted to the jury the following: (a) That the stock was worth $125 a share; (b) that the company at the rate it was making profits was making sufficient to pay 30 per cent. dividends on all the stock; (c) that Paul and Lloyd Skinner had invested $400,000 in cash of their own money in the company; (d) that the company was making and had made large profits and had paid a dividend from the profits; (e) that the company had paid a dividend, which had not been paid from profits. Plaintiffs further allege that at the time of each purchase they informed the salesman that they were inexperienced in dealing in stocks and securities and knew nothing of the packing business nor the value of stocks nor the manner of ascertaining the value of same, and plaintiffs were assured by the salesman that they knew the value of the stock, and that plaintiffs could rely upon said representations, particularly as to the value of the stock, and that plaintiffs did believe and rely upon said statements. Plaintiffs allege that they first learned of the falsity of said state-

ments immediately before January 25, 1921, at which time they notified defendant of their election to rescind, and tendered back their stock and demanded the money they had paid therefor.

Bernard Splittgerber, who transacted all the business in connection with the sales, testified about the sale of May 16, 1919, that one Call, defendant's stock salesman, came to his home and asked if he had received a dividend on his stock, and witness told him "Yes," and Call then told him about how the plant was getting along and that they were building on it, about how long it would be before they started to operate the plant and that everything looked good, that the produce department was doing better than it did in 1918 up to that time and that it had earned around 15 per cent. or a little better up to that time on the capital stock; that witness could not buy the stock for $100, for they were selling it all over for $125 and that it was really worth more, and Call explained that the increase in value of land they had purchased and profits of produce department and business done in handling hams and bacon amounted somewhere around better than 40 per cent., almost 50 per cent., that is, it would amount to that if they kept on going at the rate they were going then, and that the Skinner boys had invested $450,000 of their own money in the stock, and that they were building or having built a large number of refrigerator cars; that Call told him that after the 8 per cent. dividend was deducted there was about 22 per cent. left in the treasury, and that with what they had already earned in 1919 added to the 22 per cent. already in the treasury would make 50 per cent. or more, and that, Call said, would make the stock really worth more than $125 a share. On May 27, 1919, Merrill and Call, defendant's stock salesmen, again visited Bernard at his home, and wanted Bernard to become a member of an advisory board. They talked about their packing plant and how good everything was going and wanted to sell Bernard more stock, and "they told me about the same stories that the other salesmen had been telling, and they said things were getting

better all the time." Bernard went to Omaha about the middle of July, 1919, and testified he met Robertson, treasurer of the company, and both Paul and Lloyd Skinner, and that one of the Skinners, in their office, told him they had invested $450,000 of their own money in the plant, and that he asked them, in the office, if things were going as good as the stock salesmen had been telling him, about making so much profit on the produce department, and one of the Skinners told him, even better; and they had Bernard's picture taken, and Robertson took him to see the plant. He did not say that he told the men in the office just what the stock salesmen had told him. About two weeks after the Omaha visit Mr. Call again came to Bernard's home, but no statement was related by Bernard as to what Call then represented to him, but he bought 100 shares at $125 a share. The subscription was made July 31, 1919. Again on August 22, 1919, Call visited Bernard and 50 more shares were purchased, but nothing is stated as to what Call told him at that time. On cross-examination Bernard said that Hughes, the first salesman, told him the stock salesmen were being paid a salary and were not working on a percentage basis, and that the salesman put down figures to show the earnings and what the stock was worth, but witness knew nothing of the way to estimate value of stock and relied on what the salesman told him. He testified on cross-examination that he knew the company had to sell stock before it could operate, and that he did not know how much stock had been sold when he made his purchases; that he did not know whether the salesmen on May 27, 1919, talked the whole thing over, but did recite some that were in accord with his direct testimony. There are some other matters testified to, which need not here be extended. Bernard's deposition was taken by the defendant in October, 1927. Several statements he made then were at variance with those given by him in court. His testimony in many respects is not very satisfactory, but the jury saw and heard him, and it was for the jury to say what degree of credit should be given to his testimony.

It was disclosed in the evidence that the Skinner Packing Company was organized about March, 1918, for the purpose of establishing a meat packing business on an extensive scale to compete with other large packing houses, and during all the years 1918 and 1919 was purchasing land and erecting buildings at a very large expense. While that was in progress the company engaged in a produce business buying and selling produce and meats. The work kept progressing during the next few years, but the packing plant was not in operation till some time after Splittgerbers' last stock purchase. The company asserts that there was a large increase in the value of the land that had been bought, and that the produce department had made profits, and with those profits, and interest on the notes given by purchasers of the company's stock and interest and appreciation of other securities, a dividend of 8 per cent. was properly and legally paid at the end of 1918, but the company does not contend that in 1919 it was making 30 per cent. profit or had made 15 per cent. at the time of plaintiffs' purchases in 1919, nor does it claim that the agents were paid a salary for selling stock, but this was withdrawn from the jury. Paul and Lloyd Skinner had subscribed for $400,000 of the stock, for which Paul gave Liberty bonds for $25,000 and his notes for $175,000, and Lloyd had given a check for $25,000, which was carried as cash, and $175,000 in notes. The check for $25,000 was never cashed and the Liberty bonds and check and their notes were turned back to them and their stock certificates canceled in June, 1920. Defendant contends that the value of the notes must be considered as the equivalent of cash, unless it affirmatively appears that the notes were not collectable, and inasmuch as no evidence was received to prove the notes were not collectable, the alleged representation that the Skinners had invested $400,000 in cash in the company must be presumed to be the truth. It was the custom of the company to sell stock for cash or part cash and part on time for which notes were given, and where notes were given the company held the stock as collateral. We do not concede that these

subscriptions of Paul and Lloyd Skinner, under the situation developed in this case, are the equivalent of a stock purchase for cash in those amounts. As the work progressed the company was a heavy borrower of money to carry on the project, and if these shares to the amount of $400,000 had been paid for in cash, one can readily see that it no doubt would have greatly strengthened the company's resources. The court at appellant's request instructed the jury that a note which is collectable is the equivalent of cash, and that if the jury found from the evidence that Paul and Lloyd Skinner had put into the company cash or its equivalent in notes which were collectable, the jury should disregard the allegations that the Skinners had invested the $400,000 in the company. The appellant cannot now complain of such submission to the jury.

In regard to the alleged false representation that the company had paid dividends from profits, at appellant's request the court instructed the jury that profits of a corporation include earnings from the operating departments, increases in values of properties purchased at figures less than they were worth, or that increased in value after the purchase, and earnings from interest on notes, Liberty bonds or other securities owned by the corporation; and the court further instructed the jury that the fact that an appreciation in real estate as shown by an appraisal was entered on the books of the company is not evidence that such appreciation so entered on the books of the company did not correctly reflect an increased value of the real estate. The testimony shows that on August 1, 1918, the Southwestern Appraisal Company made an appraisal of the real estate of the company and placed its value at $372,779.55, which property had cost the company $98,661.67, and on December 7, 1918, the directors authorized and directed the auditor to "set up" the appraised value to the end that the records might show the actual surplus in the company's financial affairs, and on the same date declared an 8 per cent. dividend on preferred stock, the dividend to be paid in cash to holders of shares fully paid for, and that

dividend be credited on the unpaid notes given for stock. It is disclosed by the evidence that the net surplus profits from the produce department was $3,504.77, and the increase in value of property, interest on notes given by stockholders of about $48,000 and interest then due on bonds and other securities of about $47,000, and that out of these surplus earnings and the appreciation in the value of their properties the company paid to stockholders in cash $56,000, and credited $48,000 on notes of stockholders. Under the instructions of the court that the increase in appraised value of the property should be accepted as the true value of those assets, the payment of the 8 per cent. dividend was justifiable.

"All dividends on corporate stock, in the absence of any efficient showing to the contrary, are presumed to be out of income." *Soehnlein v. Soehnlein,* 146 Wis. 330.

"The term 'net profits' or 'surplus profits' may be defined as what remains after deducting from the present value of all the assets of a corporation the amount of all liabilities, including capital stock, in other words, that which remains as the clear gain of a corporation, after deducting from its income all expenses incurred and losses sustained in the conduct and prosecution of its business." 14 C. J. 802. See, also, *Miller v. Bradish,* 69 Ia. 278.

The court in its instructions told the jury that it was for them to determine whether the defendant had profits or earnings out of which a dividend could have been paid, and defined a dividend as the profits of a corporation apportioned among its stockholders, but did not state what could properly be considered as profits. But the court instructed, at defendant's request, that, unless the jury found from the evidence that the plaintiffs understood that this dividend was paid exclusively from the operation of the business of the company, the allegation concerning the 8 per cent. dividend should be disregarded, and that, if plaintiffs understood that the dividend was paid out of a fund created in part by earnings from the operation of its business and in part from increase in value of its real estate and otherwise,

the allegation concerning the dividends should be disregarded. The defendant, therefore, cannot now claim that there was error in submitting to the jury the right of the company to declare the 8 per cent. dividend in December, 1918.

It is contended that the testimony of J. J. Buresh as to the value of the stock in 1919 was improperly admitted. He was plaintiffs' only witness on that question. He was auditor of the company from April, 1919, to March, 1921. The company's general ledger for 1918 and 1919 was lost, except a part of it consisting of some loose leaves, which were used by him, but which are not attached to the bill of exceptions. He testified that without that book he could only give estimate of the value of the stock from his memory of the company's condition. He testified that he knew how much stock was outstanding and what the book record showed were the assets and liabilities and from time to time made financial statements from the books, and would know the value of the stock in 1919, and "Well, I will say after eliminating certain items that I knew from working there that the stock would probably be worth $50 to $60" a share, and that the items he eliminated were promotion account and the amount paid for selling the stock, and their admission in the answer was placed in evidence that $487,100 of common stock and preferred stock of $5,997,950 at par value were outstanding, and of that amount $721,-597 of subscribers' notes were not paid and are uncollectable, and that no stock was sold after December 20, 1919; and witness testified that the uncollectable notes would reduce it materially, but could not say how much unless he had the rest of the figures; that the company paid over $1,000,000 for selling its stock, that he took into consideration such uncollectable notes and these uncollectable notes would reduce the value $10 a share. On cross-examination he testified that, when subscribers' notes were given for stock, the stock was held by the company as collateral, and if the notes were not paid, stock to the amount of the unpaid notes would be canceled and the amount of stock outstanding would automatically be reduced accordingly, and

that on December 31, 1920, as auditor, he made and signed a statement showing that the book value was $115 a share, and in June, 1920, he, as auditor, prepared a statement showing that the total assets at cost was $8,565,494.13, and deducting cost of promotion amounting to $848,121.55, or a representation to the investors of $104 a share. Add to this the increased value of the property, $1,500,000, and you have a total value of $9,217,372.85, or a relative value of $124 a share, after deducting all costs of promotion and organization; that he did not know how much Liberty bonds were on hand in July, 1919, but would say $500,000 or more, maybe $600,000; did not know how much had then been expended on cost of real estate, equipment and building; certificates of deposit then held were around $500,000 to $600,000; cannot remember how much cash was then on hand; could not remember the amount of stock then outstanding; that the promotion organization expenses in July, 1919, were around $300,000 to $400,000; did not know amount of stock sold between July and December, 1919, when stock sales ceased. His testimony plainly shows such lack of knowledge of the assets and liabilities that his testimony was incompetent.

Much time was devoted in the trial to show that Bernard Splittgerber knew, or was possessed of sufficient facts from which he should have known, as early as July, 1920, the facts concerning the alleged false representations, and was guilty of laches in waiting until January, 1921, to rescind. There are several circumstances which indicate that he might have known in July, 1920, the true condition of the company, in so far as affected the falsity of the representations, but he denied positively any such knowledge, and it was for the jury to say when he discovered, as he alleged, the falsity of the salesmens' statements. Among other circumstances urged by defendant was that Bernard had been appointed a member of an advisory board. There is nothing in this appointment that estops him from rescinding. The court instructed the jury that, if they found that plaintiffs discovered the fraud, or were put upon inquiry or had

good reason to discover the fraud in the summer or early fall of 1920, a rescission as of January 25, 1921, or thereabouts, was too late, and that, if they so found, they should return a verdict for defendant, so that issue was fairly submitted to the jury.

Appellant urges there was error in receiving improper testimony, part of which was later withdrawn. Mr. Ritchie, defendant's attorney, was the first witness called by plaintiffs, and two letters were admitted which he had written and sent out to the stockholders in the early part of January, 1921, in which he urged stockholders not to sue the company, but if they had a grievance to come before the directors, and stated that the stock was worth $100 a share, and explained some reasons for losses and troubles the company was having. Those letters are not relevant, but after the letters were admitted Mr. North asked Ritchie, "And in that letter you advised this man Taylor (to whom one of the letters was written) that he had better not sue the company, and he did and got judgment against the company, and it was paid? A. Yes; over my protest. Q. In this court, didn't he? A. Yes. Q. For $14,750? A. Yes. And then Mr. Ritchie went on to explain. In fairness to the court, it will be noted that there was no objection to these questions, but they were highly improper.

Another feature along this line occurred when plaintiffs' counsel charged that Mr. Ritchie was representing the Skinners in this suit. Mr. Ritchie denied that he was acting for the Skinners, and stated he had received no compensation from them. At the inception of this case Paul and Lloyd Skinner and the Skinner Manufacturing Company were made defendants, and Mr. Ritchie filed a demurrer for Lloyd Skinner and the Skinner Manufacturing Company, and a special appearance for Paul Skinner. These parties were later dismissed from the case, leaving only the Skinner Packing Company defendant. When Mr. Ritchie denied that he was acting for those parties, the plaintiffs introduced in evidence the demurrers and the special appearance. Afterward the court withdrew them from the jury.

It was immaterial whether Mr. Ritchie had been attorney for those parties or not. If that had been the only attack on Mr. Ritchie, the subsequent withdrawal of those pleadings probably would have cured the error.

Misconduct of plaintiffs' attorney is another alleged error. The plaintiffs' attorney admits that some of the questions and statements of plaintiffs' counsel may have been ill-advised, but claims that the alleged misconduct of appellees' attorney were invited by defendant's counsel. The record shows many flagrant violations by both attorneys of the rules that should govern counsel in the trial of a case. At one time, a reference having been made about filing claims with the receiver, Mr. North said to Mr. Ritchie, "Mr. Ritchie, do you mean to say that you don't know that you disposed of hundreds of claims in that receivership?" Mr. Ritchie: "Claims?" Mr. North: "Claims of stockholders canceling their contracts." Some questions were asked the witness Buresh about Mr. Ritchie going into federal court as attorney for the company and making arrangements for the appointment of a receiver, and that Mr. Ritchie and two other attorneys became attorneys for the receiver. Objection to this was sustained. Another question asked the same witness if checks for attorney's fees in the spring of 1920 for Mr. Ritchie were made payable to him or to Skinner and Robertson. Objection to that was sustained. Another question was whether Mr. Ritchie was interested in the pay he was getting. Objection sustained. Mr. North then asked, "All right, I want to ask you whether you think that Mr. Ritchie was doing the best he could for the Skinner Packing Company, or whether you thought he was doing the best he could for Paul and Lloyd Skinner and Dr. Gilmore, directors of the company, that gave him his job?" At the court's suggestion the words "that gave him his job" were omitted, and the witness answered, "Well, I thought he was working in the interest of Paul and Lloyd Skinner and Dr. Gilmore. I know he had been the private attorney for Dr. Gilmore, prior to the trouble." Another question was asked, who was the lawyer for the company

when the contract, known as the "Dold" contract, was made and who checked and approved it, and afterward Keith Neville, receiver, said was very detrimental to the Skinner Packing Company? This was not answered. There were other instances where plaintiffs' counsel asked questions to which objection was sustained and counsel persisted in repeating same in substance. Mr. Campbell, a witness for defendant, was asked on cross-examination whether he knew false representations were made to one Theo. Huettner about sale of stock, and whether Huettner rescinded as soon as he learned of it. There are other similar episodes, which it is unnecessary to set out. The instances above cited were not invited by defendant's counsel. There were frequent bitter verbal clashes between the attorneys, for many of which defendant's counsel was responsible. These exchanges of personal charges and recriminations were so frequent that Judge Wakeley, who was ill near the close of the three weeks trial, stated he was unable to cope with counsel, and gave up that part of it. Throughout the record the trial judge, distinguished for learning and probity, appears as a grieved observer of continued improprieties which he felt himself unable to suppress. It is clear that he was unable to end them by admonition and entreaty.

Appellant urges error because the court gave several instructions marked "Instruction asked by defendant." This court has frequently advised against the propriety of so marking instructions. In this case the instructions were given before the arguments. In Mr. Chase's opening argument for defendant, he read one of the instructions which has been given. Mr. North said, "May I ask you whether this is instruction No. 4 of the court's instructions, or whether it is instruction No. 4 of the instructions requested by defendant Skinner Packing Company?" Mr. Chase: "It was an instruction, I think, prepared at our office, but given by Judge Wakeley." Mr. North: "It is the Skinner instruction No. 4, as requested by the Skinner Packing Company." The effect naturally would be to disparage the instructions.

The first petition was filed against the Skinner Packing Company on November 21, 1923, and an attachment then issued on affidavit of plaintiffs' agent that they claimed due them $30,750 and interest, total amount $37,231.32, and that he believed plaintiffs should recover that amount and that defendant was a nonresident. On November 28, 1923, an amended petition was filed, bringing in new parties. On December 28, 1923, one Canaday was appointed receiver of the company. On January 26, 1924, the original and amended petition were on motion of defendant company stricken from the files and the case dismissed without prejudice. On February 2, 1924, at the same term, the court entered an order amending its order of January 26, stating that it was not the intention of the court to provide for a dismissal of said cause which would result in automatic discharge of the attachment, and the order of January 26 was modified and corrected as follows: "Wherefore, it is ordered, adjudged, and decreed that the petition and amended petition and motion to strike from the files previously filed by the plaintiffs here be and are hereby stricken from the files of this court, without prejudice, and the plaintiffs are allowed 10 days from this date to file an amended petition." Appellant and the receiver moved to discharge the attachment because the affidavit did not correctly state the amount that plaintiffs believed they were entitled to recover, and also moved to quash the attachment because the original and first amended petition were stricken from the files and the attachment thereby discharged, and during the time between the order striking the said petitions from the files Joseph H. Canaday was appointed receiver by the district court for Douglas county.

The striking of the original and amended petition from the files with leave to file an amended petition in 10 days did not have the effect of terminating the case. The same causes of action were in the stricken pleadings as in the petition on which the case was tried. It was done at the same term of court, and the court had jurisdiction, and the striking of the petitions did not discharge the attachment.

For the errors above set out, the verdict and judgment on the second, fourth, fifth, and sixth causes of action are reversed and remanded to the district court for new trial. The first cause of action is dismissed.

REVERSED.

Note—Corporations, 37 L. R. A. 606; 14 L. R. A. n. s. 1176; 12 R. C. L. 493; R. C. L. Perm. Supp. 3108; 55 A. L. R. 23; 7 R. C. L. 283; R. C. L. Perm. Supp. 1960.

JENS C. TAULBORG, APPELLANT, V. SOPHUS B. ANDRESEN ET AL., APPELLEES.

FILED JANUARY 8, 1930. NO. 26500.

1. **Damages**: EVIDENCE. In an action for damages by reason of alleged negligence of another, evidence as to the financial standing of the parties is inadmissible.
2. **Trial**: EVIDENCE. Where a plaintiff in a personal injury action makes no attempt to show that the defendant is indemnified from loss by an insurance company, it is not proper for the defendant to offer testimony showing that he is not indemnified by insurance.
3. ———: INSTRUCTIONS. The instructions of the court to the jury must be read in open court, and if, after the jury have retired for deliberation, the necessity arises for further instructions or communications of any kind concerning the case, the same should be given in open court in the presence of the parties or their counsel.
4. **Negligence**: AUTOMOBILES: CARE REQUIRED IN DRIVING. The operator of a motor vehicle in backing the same onto a street or highway must look backward, not only before he begins his operation, but also while he is in the act of backing, and must give a signal of his intention to back when a reasonable necessity for it exists, in order that he may not collide with or injure those lawfully using such street or highway.
5. **Appeal**: INSTRUCTIONS. Record examined and *held* that the supplemental instruction given the jury after they had retired was erroneous and constituted reversible error.

APPEAL from the district court for Douglas county: JAMES E. RAIT, JUDGE. *Reversed.*

Gray, Brumbaugh & McNeil, for appellant.

Edward J. Shoemaker, contra.

Heard before GOSS, C. J., ROSE, GOOD, EBERLY and DAY, JJ., and REDICK and RYAN, District Judges.

RYAN, District Judge.

This is an action by Jens C. Taulborg against Sophus B. Andresen and Hazel Andresen for damages resulting from an automobile accident. The plaintiff alleges in his petition that on the 3d day of October, 1926, while he was riding toward Omaha as a passenger in an automobile driven by one Amos Giller, defendants negligently and without warning backed a truck, owned and operated by them, from a place just off the edge of the paving on the right-hand side of the Military highway, in front of and against the car in which the plaintiff was riding; that as a result thereof the plaintiff was seriously injured and suffered damages.

The specific acts of negligence charged against the defendants were their failure to observe a proper lookout for cars approaching from the west along the Military highway, which the defendants knew was a highway upon which cars were almost continually passing, and in their failure to sound their horn or in any manner announce their intention to back the truck onto the highway and in front of the approaching line of traffic.

The defendants' answer was a general denial and an allegation that at the time of the collision the defendants' truck was standing parallel to the pavement, and that it was standing still and was headed in an easterly direction. Defendants further alleged that the plaintiff and the driver of the car in which the plaintiff was riding were negligent, in that they drove at a dangerous rate of speed and did not have the car under control. The reply of the plaintiff was a general denial. At the conclusion of plaintiff's evidence the court upon motion directed a verdict in favor of the defendant Hazel Andresen and dismissed the action as to her. This action is not complained of and is sustained by the evidence.

It appears from the record that the accident occurred a short distance northwest of the city of Omaha, at a place where Seventy-second street intersects the Military highway, and that the Military highway is a paved road connecting the cities of Omaha and Fremont. The defendants were operating a fruit stand near the place where the accident occurred. The evidence is in hopeless conflict as to the manner in which the accident occurred. Plaintiff claims, and introduced evidence tending to show, that the defendant, Sophus B. Andresen, backed his truck onto the paved highway in front of the automobile in which the plaintiff was riding, as it approached from the west. The defendant denies this and introduced testimony to the effect that the automobile in which the plaintiff was riding was being operated at a very high rate of speed, and that as it approached a place opposite to where the truck was standing it swerved off from the pavement and struck the defendant's truck and in this collision the plaintiff was injured.

The plaintiff makes numerous assignments of error, but they may be considered under two general headings: First, misconduct of counsel for the defendants; and, second, errors of law occurring at the trial.

The specific misconduct complained of on the part of defendants' counsel is a reference in his opening statement to the financial condition of the defendants, wherein he referred to them as "living on a rented farm." This same line of conduct was continued in the examination of the defendants as witnesses. Plaintiff further complains that the defendant was permitted to testify that he did not have any insurance on his car at the time the accident occurred.

The alleged error of law complained of consisted in the court submitting to the jury, after they had retired for deliberation, a memorandum, delivered to them in the jury room by the bailiff, being an instruction given by the court defining the term "Proper Lookout," without notice to the parties or their counsel and not in the presence of the parties or their counsel. It appears that the jury retired for

deliberation on October 26, 1927, at 9:25 a. m.; that at 2:50 p. m. they sent the following communication to the court: "Honorable Judge Rait. Will you please define for this jury what is meant by 'consisted in his failure to observe a proper lookout for cars approaching from the west?' This jury would appreciate your definition of the word 'lookout' as pertaining to automobile driving. W. B. Griffin, Foreman of Jury." That without notice to the parties or counsel and not in the presence of the parties or their counsel the court sent the following reply to this communication: "Gentlemen. In answer to the above inquiry you are advised that 'Proper Lookout' means to look out for or observe approaching cars, providing a person ordinarily prudent would have looked for or observed approaching cars under the circumstances surrounding this accident. 2:50 p. m. Attach to instructions. James E. Rait, Judge."

The verdict of the jury was returned at 4 o'clock p. m. Counsel for plaintiff argues that it is evident, from the communication of the jury to the court and the request for the definition of the term "Proper Lookout," that the jury were committed to the plaintiff's theory as to the manner in which the accident occurred, and that the instruction given by the court, without notice and not in the presence of parties or their counsel, was prejudicial error.

We shall consider the assignments of error in their order. In an action for damages by reason of alleged negligence of another, evidence of the financial standing of the parties is clearly inadmissible. If a party has sustained damages by reason of the negligence of another, he is entitled to a verdict for the amount of the damages which he is able to prove, and no more, and he is entitled to such a verdict regardless of the ability of the defendant to pay. As was said in *Laidlaw v. Sage*, 158 N. Y. 73, where similar evidence had been admitted: "It has ever been the theory of our government and a cardinal principle of our jurisprudence that the rich and poor stand alike in courts of justice, and neither the wealth of the one nor the poverty of the other shall be permitted to affect the administration of the law."

As to the showing that the defendant was not protected by liability insurance the appellee relies upon the case of *Jessup v. Davis*, 115 Neb. 1. In that case, following the doctrine announced in *Miller v. Central Taxi Co.*, 110 Neb. 306, this court held that it was error for the court to sustain an objection to interrogatories which tend to develop the fact as to whether the defendant is indemnified from loss by an insurance company. This doctrine appears to have been announced by the court and adopted as a rule of practice in this state by reason of the fact that the insurance companies by virtue of the insurance contract are given the absolute right to control the defense of any action that may be brought and become the sole interested parties defendant to the extent of the amount of the insurance.

In the *Jessup* case, *supra*, the court said: "In the form of the proceeding before us the real defendant, though unnamed apparently, as a matter of fact, seeks to avail himself of the benefit of the vouchments of the ostensible party defendant. Under the terms of the contract of insurance, it cannot be said that the witness apparently called and vouched for, as to veracity and standing by the apparent defendant, is, in fact, his witness, when he is actually selected and called as the witness of the real party in interest, the insurance company, and entitled to no other vouchment. Indeed, the entire theory of legal procedure outlined in these contracts for liability insurance contemplates a proceeding carried on secretly, by a real, though unknown, party in interest, making use of concealment and deception. Its essential nature is therefore incompatible with an 'open court' and judgments publicly and openly arrived at. To compel and permit such proceeding is to countenance and participate in what is tantamount to a fraud."

The reasoning supporting the rule which permits a plaintiff to show that an insurance company is actually defending an automobile damage suit is not applicable to the facts in the instant case. It is apparent from the record that the plaintiff was satisfied that the defendant was the

real party in interest and tried his case upon that theory, and it was improper to permit the defendant to emphasize the fact that he was the real party in interest.

We come now to the instruction given by the court to the jury without notice to the parties or counsel. The matter of instructions to juries is covered by statute. Comp. St. 1922, secs. 8796, 8799. Those sections read as follows:

"Section 8796. The court must read over all the instructions which it intends to give, and none others, to the jury, and must announce them as given, and shall announce as refused, without reading to the jury, all those which are refused, and must write the words 'given,' or 'refused,' as the case may be, on the margin of each instruction."

"Section 8799. After the jury have retired for deliberation, if there be a disagreement between them as to any part of the testimony, or if they desire to be informed as to any part of the law arising in the case, they may request the officer to conduct them to the court where the information upon the point of law shall be given, and the court may give its recollection as to the testimony on the point in dispute in the presence of or after notice to the parties or their counsel."

Commenting upon these sections of the statute, this court, in the case of *McDuffie v. Bentley*, 27 Neb. 380, in an opinion by Cobb, J., said: "From the language of this section it is clear that it was the intention of the legislature to make it the duty of the trial court to read to the jury all instructions given to them on the trial of a cause; or, in other words, to make the method of giving instructions that of reading them to the jury. The statute not only imposes upon the court the duty of reading the instructions to the jury, but insures to every suitor the right to have all the instructions which he shall present, and which shall be deemed proper to be given to the jury, read to them, at length, by the court. A refusal or neglect to discharge this duty, and a denial of this right to a suitor, in any cause, are administrations without that 'due process of law' required by the Constitution of this state, and must be held to be reversible error."

The appellee seeks to justify the giving of the supplemental instruction, without notice to the parties or their counsel, on the ground that it was not an instruction but merely a communication, and cites the cases of *First Nat. Bank v. Hedgecock*, 87 Neb. 220, and *Music v. Adams*, 96 Neb. 298.

In *First Nat. Bank v. Hedgecock, supra*, the court gave an additional instruction upon the issues in controversy and the burden of proof. It does not clearly appear from the opinion whether this instruction was given in open court or sent to the jury room, and the case merely decides that "it is proper for the district court to further instruct the jury after the cause has been submitted, when upon written communication from the jury it appears that further instruction is necessary to enable the jury to correctly understand the issues submitted."

In *Music v. Adams, supra*, the communication was simply a question and answer, and in no wise attempted to state the issues or to instruct the jury as to the law concerning them, and in that case the court held the communication was not prejudicial.

If it becomes necessary to give further instructions to a jury while it is deliberating, the proper practice is to call the jury into open court and to give any additional instructions in writing in the presence of the parties or their counsel.

The supplemental instruction given in this case, however, is an erroneous statement of law. One of the most important disputed questions of fact in the case was whether or not the defendant backed his truck onto the highway. It is evident that the jury were discussing this question at the time the foreman made the request for the supplemental instruction. The instruction given by the court left it for the jury to decide what sort of a lookout, if any, the defendant should have kept for cars approaching along the highway. The highway in question is a paved highway leading into the city of Omaha, and is what is termed an "Arterial Highway." If, as the plaintiff contends, the defendant was backing his truck onto said high-

way, he would necessarily be operating it against the line of approaching traffic from the west. The law does not forbid the backing of an automobile upon the streets or highways, and to do so does not constitute negligence, but the driver of an automobile must exercise ordinary care in backing his machine, so as not to injure others by the operation, and this duty requires that he adopt sufficient means to ascertain whether others are in the vicinity who may be injured. It is his positive duty to look backward for approaching vehicles and to give them timely warning of his intention to back, when a reasonable necessity for it exists; and he must not only look backward when he commences his operation, but he must continue to look backward in order that he may not collide with or injure those lawfully using such street or highway. 42 C. J. 935; Blashfield, Encyclopedia of Automobile Law, pp. 529-533; Berry, Automobiles (4th ed.) secs. 235, 954; Huddy, Automobiles, p. 324; *Lee v. Donnelly*, 95 Vt. 121.

The supplemental instruction, being erroneous, was prejudicial, and a new trial must be granted. The judgment is therefore reversed and the cause remanded to the district court for a new trial.

REVERSED.

JULIUS HOWARD SORENSEN, APPELLEE, V. GRAND ISLAND CLINIC ET AL., APPELLANTS.

FILED JANUARY 15, 1930. No. 27011.

1. **Trial**: INSTRUCTIONS: ISSUES. In an action for malpractice, an instruction summarizing the allegations of the petition and the answer and stating what issues are raised by the pleadings is not necessarily erroneous and prejudicial as submitting to the jury unproved charges of negligence, where the trial court in a following instruction stated the only issues on which there was proof and limited the jury to a consideration thereof.
2. **Physicians and Surgeons**: MALPRACTICE: VERDICT. In an action on behalf of a boy 14 years of age to recover damages for the loss of his left forearm through malpractice of a surgeon who resorted to an open operation to reduce a fracture of the radius, a verdict in favor of plaintiff for $8,000 *held* sustained by the evidence.

3. Courts: RULES OF EVIDENCE. A rule of evidence adopted by the supreme court, unless overruled by it or changed by legislation, is binding on the district courts.
4. Trial: REFUSAL OF INSTRUCTION. The refusal to give a requested instruction is not erroneous, where the substance thereof is given in another instruction that is free from error.

APPEAL from the district court for Hall county: EDWIN P. CLEMENTS, JUDGE. *Affirmed.*

Prince & Prince and *H. A. Bryant*, for appellants.

Fradenburg & Matthews and *Mayer, Kroger & Mayer, contra.*

Heard before GOSS, C. J., ROSE, DEAN, GOOD, EBERLY and DAY, JJ., and DINEEN, District Judge.

ROSE, J.

This is an action to recover $50,000 in damages for malpractice. Julius Howard Sorensen, called "Howard" in the record, a boy 14 years of age, by his father, Samuel K. Sorensen, as guardian, is plaintiff. The Grand Island Clinic, a corporation, is a defendant. Winfred Woodworth Arrasmith and William H. Hombach, members of the Clinic, are the other defendants. Arrasmith and Hombach are regular practitioners of medicine and surgery at Grand Island.

Evidential facts about which there is no dispute may be summarized as follows: Between 5 and 6 o'clock in the evening, Saturday, February 11, 1928, "Howard" and a number of other boys were playing ball in a vacant lot adjoining the home of E. E. Farnsworth, a physician and surgeon, secretary and treasurer of the Clinic, and a resident of Grand Island. While Farnsworth was watching the game from a sidewalk at his residence, Howard was pushed by one of the other players and, to protect his body from the violence of a fall, struck the ground with the palm of his left hand, breaking the ulna and the radius of his left forearm at the junction of the middle and upper third. He went immediately to Farnsworth who, at his house, attempted to set the broken bones. Failing to do so with

the means at hand, he promptly took the patient in an automobile to the Clinic, called the boy's father and turned the case over to Arrasmith, who took charge about 6 o'clock the same evening, left the boy in a room at the Clinic, went for a lunch, returned, directed a nurse to administer gas, which was given, and attempted without success to reduce the fractures by manipulation and extension. Without delay the patient was taken to another room in the Clinic, where an X-ray machine was used and where the fractures were examined with a fluoroscope, an instrument employed in observing shadows cast by objects in the path of the X-rays. While the boy was again under the influence of an anæsthetic, ether having been given, Arrasmith, observing the broken bones through the fluoroscope, devoted 15 or 20 minutes to a further attempt to reduce the fractures by manipulation and extension. In this manner the fracture of the ulna was reduced. The broken ends of the radius were also put in apposition, but did not stay in place. Immediately thereafter Howard was taken to the St. Francis Hospital at Grand Island, again anæsthetized with ether and put on an operating table. Arrasmith made an open incision over the fracture of the radius, exposed the bone, drilled a hole through each of the broken ends, sewed them together with catgut, closed and dressed the wound, and encased the arm from a place above the elbow to the fingers in a rigid circular cast of plaster of Paris. The operation was completed about 11 o'clock in the afternoon on the day of the accident—Saturday, February 11, 1928. Howard spent the night in the hospital. Arrasmith called to see him there about 10 o'clock the next morning, Sunday, outlined a window in the plaster of Paris cast over the incision, and authorized the boy to go home at 3 o'clock in the afternoon of the same day. After the window outlined had been cut, Howard went home at the appointed time. Neither Arrasmith nor any one else representing him or the Clinic saw the boy until 1 o'clock in the afternoon on the following Tuesday, when he returned to the Clinic with his broken arm gangrened below the elbow. Arrasmith removed the rigid cast of plaster of Paris and

directed treatments to restore circulation in the arm below the fractures. The means employed were futile and the patient was returned to the hospital, where treatments to restore circulation were continued without success from Tuesday evening until the following Thursday. During the afternoon Arrasmith in his automobile took Howard to Lincoln, where J. E. M. Thomson and H. W. Orr, physicians and surgeons, amputated the broken arm above the elbow.

From plaintiff's standpoint, negligence in a number of particulars was pleaded at great length, and, as fully as necessary for the purposes of review, will be stated in connection with an assignment of error. In the answers of the Grand Island Clinic and Arrasmith, the history of the case and the details of the operation and treatment, as viewed by defendants, were pleaded with great particularity. They also pleaded skill, proper surgery, and careful treatment, and denied the negligence charged. Hombach adopted the answers of the other defendants and alleged further that his only connection with the case was his assistance in taking the X-ray pictures. The reply to the unadmitted allegations of the answers was a general denial.

Upon a trial of the issues the jury rendered a verdict in favor of plaintiff for $8,000. From a judgment therefor defendants appealed.

One of the assignments of error is directed to the proposition that the trial court erred in submitting to the jury many issues of negligence pleaded in the petition but having no support in the evidence. The criticism is aimed at instructions in which the district court summarized what the parties alleged in their respective pleadings, regardless of proofs. In the petition and in the answers lengthy and unnecessary allegations were inserted. The trial court in a somewhat abbreviated form recited plaintiff's allegations, making it clear that they were from the petition. The allegations in the answers were treated in the same manner. Following the recital of allegations from the petition and answers and restated in the instructions, the jury were told that, in substance, they were the issues rais-

ed by the pleadings. The issues, however, that the jury were required to consider were stated in an instruction as follows:

"You are instructed that the pleadings and claims of the parties in this case may be briefly summarized as follows: The plaintiff claims that the defendants were careless and negligent in the method adopted for the setting of his broken arm and were negligent and careless in the manner in which they set said arm and the care and attention given him after the arm was set and that said negligence and carelessness was the direct and proximate cause of the loss of his said arm whereby he has been damaged. The defendants deny that they were negligent or careless in any of said particulars and that they used due care, caution and skill in the method employed to set said arm and in manner in which said arm was set and in the care and attention given the plaintiff thereafter. These are briefly the issues which you are to consider in this case and in considering these issues you must be governed by the evidence in the light of the following rules of law. You cannot consider any acts of negligence except such as are set out in the petition."

While this quoted instruction did not conform to correct standards of English, it stated the only issues on which there was evidence and limited the jury to a consideration thereof. For days the testimony of specialists in surgery and of others was directed to those identical issues. There is nothing to indicate that the jury misunderstood them. Any juror fit for service would comprehend what he was required to determine under the instruction quoted and that he was limited to evidence on the issues submitted for the consideration of the jury, though other issues may have been raised by the pleadings. On this phase of the appeal the point is that issues of negligence on which there was no evidence in favor of plaintiff were erroneously submitted to the jury. The determination of this question required a critical examination of more than 500 pages of testimony, much of it technical in character. After performance of this judicial task, the conclusion is that every

issue of negligence submitted to the jury by the instruction quoted is supported by sufficient evidence and that the evidence as a whole sustains the verdict and judgment in favor of plaintiff.

Defendants contend also that the trial court erred to their prejudice in requiring Arrasmith as a witness to answer the following question: "Do you carry insurance protecting you against claims of this kind?" To that question the witness answered "I do."

The ruling of the court below was authorized by a rule of evidence adopted by the supreme court in *Jessup v. Davis*, 115 Neb. 1, 56 A. L. R. 1403, Good, Rose and George A. Day, JJ., dissenting. The rule thus announced, though at variance with the opinions of most of the courts in other jurisdictions, has never been judicially overruled or changed by legislation. It was therefore binding on the district court. In following the rule adopted by the state court of last resort the district court did not err.

Defendants insist further that the trial court erred in refusing to give a requested instruction, but the point is not well taken for the reason that a correct instruction given contained in a different form the substance of the one requested and refused.

Error prejudicial to defendants has not been found in the record and consequently the judgment below is

AFFIRMED.

IN RE HEIRSHIP OF SHERMAN C. ROBINSON. ALICE E. ROBINSON ET AL., APPELLANTS, V. W. M. CLARK, ADMINISTRATOR, APPELLEE.

FILED JANUARY 15, 1930. No. 26944.

1. **Descent and Distribution: HEIRSHIP STATUTE.** Article XVI, ch. 15 (sections 1481-1488), Comp. St. 1922, as amended by chapter 65, Laws 1925, commonly known as the act to determine heirship, examined, and its scope, intent, and purpose determined.
2. ———: ———. The above act is independent and complete within itself, and so remains, notwithstanding the amendment of 1925. Thus, the provisions of sections 1423 and 1424, Comp.

St. 1922, in so far as they infringe upon this act, were by it repealed by implication.

3. ———: ———. Such act provides for a limited and circumscribed form of administration of an estate, independent of that of an ordinary administration thereof, when more than two years have elapsed since the death of an intestate and no application for administration of the estate has been filed in this state within the interim.
4. **Statutes**: PROVISO: CONSTRUCTION. A proviso in a statute should be strictly construed, and this in the light reflected by the act or statutes of which it forms a part, not in derogation of the intent and purpose of the original, but in furtherance thereof.
5. **Descent and Distribution**: LIENS. The proviso contained in section 1484, Comp. St. 1922, construed, and *held* to include liens existent on the lands of a decedent at and prior to his death, which come within the provisions of our recording acts, and such as arise by reason of judgments, attachments and executions, and other liens of a similar nature, but does not include that which resembles liens created by reason of the death of the decedent in favor of all creditors under section 1220, Comp. St. 1922, such as the allowed Kansas claims here involved.
6. **Executors and Administrators**: GRANT OF ADMINISTRATION. "A grant of administration has, as a matter of right, no extraterritorial force or operation." *Burton v. Williams*, 63 Neb. 431.
7. **Judgment**: PROBATE COURTS. The allowance of the claims by the probate court of Douglas county, Kansas, did not affect the lands in Nebraska.
8. **Probate Courts**: JUDGMENTS: CONCLUSIVENESS. Under section 16, art. V, of the Constitution, a county court upon its probate side is a court of general jurisdiction, and, after due and legal notice has been given, its judgments upon probate matters, including that of determining heirship (as in this proceeding), unless appealed from, are final and cannot be collaterally attacked.
9. ———: JUDGMENT DETERMINING HEIRSHIP. In a proceeding in such court to determine heirship, the title to real estate is not drawn in question. The court simply determines who are the heirs, and the law of descent passes the title.

APPEAL from the district court for Johnson county: JOHN B. RAPER, JUDGE. *Reversed, with directions.*

Frederick J. Patz and *Lewis C. Westwood*, for appellants.

Jay C. Moore, contra.

Heard before GOSS, C. J., ROSE, GOOD, THOMPSON, EBERLY and DAY, JJ., and THOMSEN, District Judge.

THOMPSON, J.

This is a proceeding lodged in the first instance in the county court of Johnson county, Nebraska, on May 9, 1928, by the petitioners, appellants herein, under sections 1481, 1482, and 1483, Comp. St. 1922, as amended by chapter 65, Laws 1925, and section 1484 of such statutes, for the purpose of having determined their heirship to lands in such Johnson county. Judgment was rendered in favor of the petitioners, appeal taken by the appellee herein to the district court, where the judgment of the county court was modified, as hereinafter indicated; to reverse which this appeal is had.

The questions involved herein are presented to this court for the first time, and, being complicated, it becomes necessary to detail both the law and the facts more than is usual.

The law applicable is as follows: Section 1481: "Where more than two years have elapsed since the death of a person residing in this state, or residing outside of the state, but owning real estate or any interest therein situated within this state, or who had made entry on any government lands and had not received patent therefor, and no application has been made in the state of Nebraska for the appointment of an administrator either by his heirs or by persons claiming to be creditors of said deceased, any heir of the deceased or other person having derived title to any real property or any interest therein from said deceased or from any of his heirs either by direct or mesne conveyances may make application by petition to the county court of the county in which the deceased resided at the time of his death, or in cases where the deceased was a nonresident of the state at the time of his death then in the county court of the county where the real estate or some part thereof belonging to the deceased in his lifetime is situated, for a determination of the time of the death of the decedent, and a determination of the heirs of said deceased, the

degree of kinship and the right of descent of the real property belonging to said deceased." Laws 1925, ch. 65, sec. 1.

Section 1482: "Upon filing such petition the county court shall fix a time for hearing said petition not less than thirty days nor more than sixty days subsequent to the filing thereof, and notice of the time and place of said hearing shall be given to all persons interested in said estate, both creditors and heirs, setting forth the filing of said petition, the date of the death of the deceased, his place of residence, a description of the real property of which he died seised, or a description of the real property on which he had made an entry but had not yet received patent, the interest in said real estate of the petitioner and the prayer of the petition. Said notice shall be published in a legal newspaper in said county for three successive weeks prior to said hearing." Laws 1925, ch. 65, sec. 2.

Section 1483: "Upon such hearing if it shall appear to the court that more than two years have elapsed since the date of the death of the deceased, that he died intestate seised of an estate of inheritance in this state, or that he died intestate having entered on government lands and not yet received a patent therefor, and that no application has been made in the state of Nebraska for the appointment of an administrator of the estate of said deceased, the court shall determine who are the heirs of said deceased, their degree of kinship and the right of descent of the real property of which the deceased died seised, or on which he had made an entry, and shall make and enter his decree accordingly." Laws 1925, ch. 65, sec. 3.

Section 1484: "Such decree, unless appealed from as provided by law, shall be binding and conclusive upon all persons including creditors and heirs, and all claims or demands against the estate of such deceased, whether due or to become due, whether absolute or contingent, shall be forever barred: Provided, however, that this section shall not be construed to effect or limit the term within which any lien against the real estate of said deceased may be enforced."

The record discloses that the petition of the applicants in both the county and district courts met every requirement of the above statutes, as did also the notice had prior to the hearing in such county court. The answer, in substance, simply challenged the right of these respective courts to enter judgment as prayed by petitioners, for the reason that claims had been filed and allowed in Kansas, as hereinafter set forth, and that they were unpaid, and that there was no other property save and except the lands here in question out of which to pay the same; further, that the claims so allowed in the Kansas court existed at the time of the death of the decedent, and were his unsecured obligations, and by his death liens were imposed on his entire estate wherever situate, and that, to the extent of bringing such claims within the proviso contained in section 1484 hereinbefore quoted. The theory at the trial was that affirmative allegations in the answer were denied.

The facts material for our consideration, admitted or left without contradiction, are as follows: That Sherman C. Robinson, a resident and citizen of Douglas county, Kansas, died on November 5, 1924, intestate, without issue, leaving as his sole and only heirs the petitioners herein; that at such time and prior thereto he was the owner of an undivided one-sixth interest in the lands here in question situate in Johnson county, Nebraska, subject to the life estate held by Alice E. Robinson, one of the petitioners herein, who had, and ever since has held, possession and control thereof, also owned lands and personal property in such Douglas county, Kansas; that more than two years had elapsed since his death, prior to the filing of the petition herein in the county court of Johnson county praying for the determination of heirship; that on November 15, 1924, appellee herein was appointed administrator of the estate of such deceased in the probate court of Douglas county, Kansas, qualified, and has been ever since, and now is, so acting; that numerous unsecured claims of indebtedness were filed in such Kansas probate court by divers and sundry creditors of the deceased, and by such court allowed;

that all of the lands and personal property in the state of Kansas were legally reduced to cash and the proceeds applied in partial payment of such allowed claims and costs of administration, leaving unpaid of such claims over $8,000; that no other property, save the lands in Johnson county, Nebraska, remains undisposed of; that shortly after the appointment of such administrator he became possessed of knowledge of the aforesaid facts in reference to these Johnson county lands, but neither he, nor any heir, nor persons claiming to be creditors of the deceased, nor other person, had applied for the appointment of an administrator in this state; that this proceeding was lodged in the county court of Johnson county, Nebraska on May 9, 1928, and answer thereto filed on June 6, 1928, on which latter date the administrator lodged a proceeding in the district court under sections 1423 and 1424, Comp. St. 1922, to obtain license to sell the lands here in question to pay the aforesaid allowed Kansas claims; the same being *Clark v. Robinson,* p. 306, *post,* a proceeding *in rem,* which was argued and submitted to us at the same time as the instant case, and action had therein as herein indicated as to this instant proceeding.

In applying the law to the issues and facts submitted in support thereof, it was determined by the county court, in substance, that the proviso which forms a part of section 1484, hereinbefore referred to, excluded from the operation of the statutes, heretofore quoted, liens which had been created prior to the death of the decedent, and not claims such as are evidenced by the administrator's answer; hence, decree was entered as prayed.

In the district court, on appeal, the holding of the county court that the claims in question were not such as were covered by the above mentioned proviso, and therefore not liens on the Nebraska lands, was held to be erroneous, in that the debts allowed by the Kansas courts are liens upon the Nebraska lands, and are such liens as are contemplated by such proviso in section 1484; and it was further held that, while the petitioners are entitled to a decree as prayed, such decree should provide that the Nebraska lands,

subject to the life estate of Alice E. Robinson, are held and possessed by them free and clear of all claims and demands against the estate, including expenses of administration, subject, however, to the debts and claims allowed by the Kansas probate court; and judgment was entered accordingly.

Thus, our attention is directed to the scope, intent and purpose of the act in question, and as to whether or not the allowed Kansas claims are liens which come within the proviso contained in the aforesaid section 1484. In this determination the act should be considered as an entirety, looking to its intent and purpose, and in this light expression should be given to its different parts. *Nebraska District of Evangelical Lutheran Synod v. McKelvie,* 104 Neb. 93. Thus, the history of the act becomes helpful, and will be noticed herein as it appears pertinent.

Considering the act as a whole, we conclude that its scope, intent, and purpose are to enable any heir of one dying intestate owning lands in this state, or to enable any other person who has derived title to such lands or any interest therein from the deceased or from any of his heirs either by direct or mesne conveyances, after two years have elapsed from the date of such death without any heir or creditor of deceased having made application for letters of administration in this state, to file a petition in the county court of the county in which the deceased resided at the time of his death, or in cases where the deceased was a nonresident of the state at the time of his death, then in the county court of the county where such lands or some part thereof is situated, for the purpose of having a determination of heirship made, and a judgment entered which shall be binding and conclusive upon all persons including creditors and heirs, and shall forever bar as to the lands in question all claims or demands against the estate of such deceased, whether due or to become due, whether absolute or contingent; and incidentally to furnish a means of procuring an otherwise unprovided for link in the chain of the record title to such lands. Thus, as we conclude, the act provides for a limited and circum-

scribed form of administration of the estate (independent of that of the ordinary administration thereof) where more than two years have elapsed since the death of the intestate and no application for administration of the estate has been filed in this state within the interim. The foregoing scope, intent, and purpose is in harmony with, and in furtherance of, the long-established public policy of this state, to provide by statute limitations, rules and regulations in respect to the title of real estate in this state so that such title may be easily ascertained and readily transferred.

An act independent and complete within itself, prompted by a similar purpose, but dissimilar in its wording, was enacted in 1913, which by reason of its exceptions and exclusions defeated its own purpose. Rev. St. 1913, secs. 1536-1539, inclusive. This act was repealed and supplanted by another independent and complete act in 1915, which was carried into the Compiled Statutes of 1922 as sections 1481-1484, inclusive, all of which last named sections, save 1484, were amended in 1925 (Laws 1925, ch. 65) by adding a provision in reference to government lands, and as thus amended, together with the aforesaid section 1484, are the sections hereinbefore quoted as being the law applicable here.

In section 16, art. VI, of the Constitution of 1875, it is provided: "County courts shall be courts of record, and shall have original jurisdiction in all matters of probate, settlements of estates of deceased persons, appointments of guardians, and settlement of their accounts; in all matters relating to apprentices; and such other jurisdiction as may be given by the general law. But they shall not have jurisdiction in criminal cases in which the punishment may exceed six months imprisonment, or a fine of over five hundred dollars; nor in actions in which title to real estate is sought to be recovered, or may be drawn in question; nor in actions on mortgages or contracts for the conveyance of real estate; nor in civil actions where the debt or sum claimed shall exceed one thousand dollars." This constitutional provision was amended in 1920, but the only change material here was by adding the words, "and in

such proceedings to find and determine heirship," immediately following the words, "of deceased persons." As thus amended it now appears as section 16, art. V, of the Constitution.

In *Fischer v. Sklenar*, 101 Neb. 553, careful consideration was given by us to the above provision of our Constitution, before such 1920 amendment, in connection with sections 1494 and 1495, Rev. St. 1913 (now sections 1439 and 1440, Comp. St. 1922), relating to the settlement and distribution of estates of deceased persons, and we held:

"Upon its probate side a county court is a court of general jurisdiction, and its judgment upon matters of probate and of settlement and distribution of the estates of deceased persons made upon due and proper notice is final and cannot be collaterally attacked.

"The probate court in the settlement of an estate has jurisdiction to find and determine who are the heirs of the decedent. In so doing the court does not determine the title to real estate. The statute of descent passes the title upon the fact so found."

Further, in *State v. O'Connor*, 102 Neb. 187, the above quoted holdings were approved, and authorities supporting such approval reviewed, and in the course of the opinion (page 190) we said: "But, in a case between rival heirs where the determination of title depends upon the question of heirship, the district court cannot make a final adjudication until that question has been settled by the county court."

Appellee cites sections 1423 and 1424, Comp. St. 1922 (being sections 100 and 101, ch. 17, Gen. St. 1873), as conferring authority upon him to sell these lands in Nebraska to satisfy the allowed Kansas claims, and insists that, as the act here in question did not provide for the amendment or repeal of such sections, it contravenes section 14, art. III, of our Constitution, wherein it is provided: "And no law shall be amended unless the new act contain the section or sections as amended, and the section or sections so amended shall be repealed." It is true that section 1423 provides: "When an executor or administrator shall be

appointed in any state or territory, or in any foreign country, on the estate of any person dying out of this state, and no executor or administrator thereon shall be appointed in this state, the foreign executor or administrator may file an authenticated copy of his appointment in the district court in any county in which there may be any real estate of the deceased." And section 1424: "Upon filing such authenticated copy of his appointment, such foreign executor or administrator may be licensed by the same court to sell real estate for the payment of debts or legacies, and charges of administration, in the same manner, and upon the same terms and conditions, as are prescribed in the case of an executor or administrator appointed in this state, excepting in the particulars in which a different provision is hereinafter made."

It is to be observed that the act of 1915 is an original and independent act, complete within itself, and, as such, it remains notwithstanding the amendatory act of 1925; for, as we held in *State v. Hevelone*, 92 Neb. 748: "The section of an act properly amended should be construed precisely as though it had been originally enacted in its amended form." Further, the act in question does not conflict with section 14, art. III, of the Constitution, above quoted, for where an independent legislative act does conflict with, or is repugnant to, a prior statutory enactment not mentioned, the prior law, by implication, is repealed or modified to the extent at least that the former is inimical to the latter. *State v. Hevelone*, 92 Neb. 748; *State v. Ure*, 91 Neb. 31. It therefore follows that, in so far as the above sections 1423 and 1424 infringe upon the act here in question, the same are by it repealed. Hence, so far as the procedure here involved and the rights of the parties in and to the lands in question herein are concerned, such sections 1423 and 1424 are without force or effect. They were not enacted by our legislature as a matter of right, or even of duty, but simply as a courtesy extended, which could be withdrawn in whole or in part at will.

It might also be well to mention, as indicating the policy of this state as well as more directly affecting the matters

involved herein, that section 1293, Comp. St. 1922, which provides for the appointment of administrators, was amended by chapter 73, Laws 1925, so as to prevent the appointment of a nonresident as administrator of the estate of a person dying intestate. Thus it will be seen that between the time of this amendatory act of 1925 going into effect and the appearance of the administrator in the county and district courts in this state nearly three years had elapsed.

Our attention has not been called, either by brief or oral argument, to section 1380, Comp. St. 1922, which provides: "An executor or administrator duly appointed in any other state or county may commence and prosecute any action or suit in any court in this state, in his capacity of executor or administrator, in like manner and under like restrictions as a nonresident may be permitted to sue: Provided, in case any executor or administrator shall have been appointed in this state, such person only shall be entitled to commence and prosecute actions or suits within this state in his capacity as such executor or administrator." However, it might be well to state that such section has reference to ordinary actions under the Code (*McAnulty v. McClay*, 16 Neb. 418) and not to proceedings to sell land of a deceased person for the payment of his debts, the latter being special and partaking of the nature of a proceeding *in rem* (*Miller v. Hanna*, 89 Neb. 224).

As to the proviso in section 1484: In *Lichtensteiger v. State*, 89 Neb. 356, we held: "A proviso in a statute is generally intended to except something from its operation which would otherwise be within its provisions." Further, as stated by us in the course of the opinion in *State v. Farmers Irrigation District*, 116 Neb. 373, 378: "The proviso, according to the ordinary rules governing such, must be strictly construed, and in the light reflected by the act or statutes of which it is made a part, not in derogation of the intent and purpose of the original, but in furtherance thereof."

With the above holdings, the act, its scope, intent, and purpose before us, what was the legislative intent in its

use of the word "lien" in this proviso? As we have seen, the Constitution, as well before as after the 1920 amendment, in granting jurisdiction to a county court, denied such jurisdiction to it in actions on mortgages or contracts for the conveyance of real estate. The legislative body must have had, and undoubtedly did have, in mind this supreme law of our state when it framed and enacted this exception to the scope, intent, and purpose of that which preceded it, and was endeavoring to keep the act within constitutional limitations. Certainly it did not have in mind other than liens existent on the lands of a decedent at and prior to his death, which come within the provisions of our recording acts, and such as arise by reason of judgments, attachments, and executions, and other liens of a similar nature. It is our view that it did not have in mind that which resembles liens created by reason of the death of the decedent in favor of all creditors, under section 1220, Comp. St. 1922 (such as the allowed Kansas claims), for if the legislature did so intend then the proviso would defeat the vital purpose of the act, save that of determining who are the heirs of the deceased person, as did the act of 1913, the defects in which were sought to be corrected in the 1915 act. In arriving at the above conclusions we have at all times had in mind that this act is without application where the deceased died testate, and also the reason for this exclusion which is that he had in his lifetime made provision as to his properties. The act in question did not include personal property, as its situs is ordinarily that of the owner, while the situs of real property is fixed by its location. Thus, such act deals solely with real estate in this state, and is limited to lands brought in question as in this proceeding. The appellee presses the thought that his clients, by reason of their having had their claims allowed in a Kansas court, stand in a different position than creditors in this and other states, whose claims, if such there be, have not as yet been allowed, and this notwithstanding he insists that other claims may be hereafter allowed as the estate is still in process of administration in Kansas. Further, he urges, by way of his brief:

"We wish to observe one peculiarity in this statute, which is that it is wholly silent about creditors or other persons appearing to assert their rights (in this proceeding), except in section 1482 it is provided that notice must be given to them, and we believe a fair construction of the law is that any creditor or administrator who would have the right to look to this property and whose claim was not otherwise barred would be entitled to have this right enforced in this heirship proceeding. Otherwise, why notify creditors or anybody save and except those who might be heirs at law or who might be holding the property under mesne conveyance. Again, it would appear that, this being a so-called short form of administration, of necessity, the beginning of such proceedings immediately gives to those whose claims are not otherwise barred the right to have such claims allowed in the heirship proceedings." Such proposition lacks a basis. If more than the two years have passed and no administration has been taken out in this state, the limitation has run and all claims are barred by statute. The sole object of giving notice to creditors is that they may appear and contest certain of the applicant's statements, to wit: That more than two years have elapsed since the death of deceased; that the decedent died intestate, seised of real estate, or an interest therein, in this state, the whole or a part of which is situate in the county in which the proceeding is instituted; that no application has been made in this state for the appointment of an administrator of the estate of the deceased; that the application is made by an heir of the deceased, or by other person authorized. These four jurisdictional questions a creditor may contest, and no more. If these are finally found as alleged, the creditor is, as to the lands in question, without remedy. It might further be stated as an axiom: The right given to a creditor of a deceased person to subject the deceased's property to the payment of a debt owing such creditor, at best, is a conditional right, one dependent upon a compliance with conditions imposed, as imposed; and a bar arises upon a failure of such compliance, whether it be as to manner or time. The statutes provide the

method, by whom, and when pursued; as to the creditor, it is compliance or waiver of all rights.

We might add that it is a generally observed rule in such proceedings that the law of the state where the land in question is situate is controlling as to it, and is not affected by that of a foreign state or country.

In *Burton v. Williams*, 63 Neb. 431, we held: "A grant of administration has, as a matter of right, no extraterritorial force or operation; and the official character of an administrator does not, by virtue of the authority creating it, follow him beyond the limits of the state in which he was commissioned."

Hence, the allowance of the claims in Kansas could not, and did not, affect lands in Nebraska.

In *Fall v. Eastin*, 215 U. S. 1, it was held: "A court not having jurisdiction of the *res* cannot affect it by its decree nor by a deed made by a master in accordance with the decree." And further held: "The full faith and credit clause of the Constitution does not extend the jurisdiction of the courts of one state to property situated in another state, but only makes the judgment conclusive on the merits of the claim or subject-matter of the suit; and the courts of the state in which land is situated do not deny full faith and credit to a decree of courts of another state, or to a master's deed thereunder, by holding that it does not operate directly upon and transfer the property." The above rules were announced in affirming the judgment of this court reported in *Fall v. Fall*, 75 Neb. 104.

In *Vaughan v. Northup*, 15 Pet. (U. S.) 1, in the course of the opinion, Judge Story said: "Every grant of administration is strictly confined in its authority and operation to the limits of the territory of the government which grants it, and does not, *de jure*, extend to other countries. It cannot confer, as a matter of right, any authority to collect assets of the deceased, in any other state; and whatever operation is allowed to it beyond the original territory of the grant is a mere matter of comity, which every nation is at liberty to yield or to withhold, according to

its own policy and pleasure, with reference to its own institutions and the interests of its own citizens."

The determination of the county court was right, and should have been sustained. Hence, the judgment of the district court is reversed and the cause remanded, with directions to enter judgment in favor of the petitioners, Alice E. Robinson and Hattie M. Sandusky, in conformity with this opinion.

REVERSED.

GOOD, J., dissents.

JOHN DIXON V. STATE OF NEBRASKA.

FILED JANUARY 24, 1930. No. 27252.

ERROR to the district court for Douglas county: HERBERT RHOADES, JUDGE. *Affirmed as modified.*

J. P. Palmer and *James Walker*, for plaintiff in error.

C. A. Sorensen, Attorney General, and *Homer L. Kyle, contra.*

Heard before GOSS, C. J., ROSE, DEAN, GOOD, THOMPSON and EBERLY, JJ., and LANDIS, District Judge.

PER CURIAM.

Upon consideration of the oral arguments, the briefs and the entire record, no error prejudicial to the rights of plaintiff in error has been found. The judgment of conviction is therefore affirmed.

It is believed that the sentence is more severe than the record warrants, and it is therefore modified so as to vacate that part of the judgment requiring the plaintiff in error to be imprisoned, and in lieu thereof a fine of $200 is imposed; plaintiff in error to stand committed to jail until such fine and costs are paid.

As modified herein, the judgment of the district court is affirmed.

AFFIRMED AS MODIFIED.

ARCHER MAURY BUNTING ET AL., APPELLEES, V. WILLIAM M. RICHARDSON, DEFENDANT: ANNE C. BUNTING ET AL., APPELLANTS: GLADYS W. BUNTING ET AL., INTERVENERS, APPELLEES.

FILED JANUARY 24, 1930. NO. 27329.

APPEAL from the district court for Lancaster county: LINCOLN FROST, JUDGE. *Affirmed.*

Paul F. Good and *Otto K. Perrin*, for appellants.

A. M. Bunting and *A. W. Richardson, contra.*

Heard before GOSS, C. J., DEAN, GOOD, THOMPSON, EBERLY and DAY, JJ., and PAINE, District Judge.

PER CURIAM.

Plaintiffs brought this action seeking partition of certain real estate described as the southwest quarter of section 9, township 10, range 6, situated in Lancaster county, Nebraska. Defendants Anne C. Bunting and James M. Bunting, represented by Paul F. Good, guardian *ad litem*, are the children of plaintiff Archer Maury Bunting. Defendants William M. Richardson, Mary A. Funkhauser, A. Clark Richardson, and Mildred T. Richardson are the children of plaintiff Waneta Bunting Richardson. Defendant Mildred T. Richardson is represented by Otto K. Perrin, guardian *ad litem*.

The controversy grows out of the interpretation of the following paragraph in the will of Anna M. Bunting, deceased:

"II. I give, devise and bequeath unto my husband, William M. Bunting, the use of all my real estate and personal property, except such as I shall expressly dispose of, hereinafter during his natural lifetime, if he shall survive me.

"After his death, if he shall survive me, all said estate, excepting such as I do hereinafter dispose of shall become the property of my daughter, Waneta Bunting Richardson, and my son, Archer Maury Bunting, and their children, to be theirs forever.

"Said Waneta B. Richardson and Archer M. Bunting to receive the equal one-half share of my estate with exceptions, as herein before noted."

Testatrix' husband predeceased her.

This appeal is presented upon a case stated, and the respective contentions of the parties are quoted therefrom, together with the conclusion of the trial court:

"That plaintiffs contend that they are the sole residuary legatees and devisees under said will and the sole owners in fee simple as tenants in common of said estate, including the premises described in the petition. That Paul F. Good, guardian *ad litem* for the minor defendants Anne C. Bunting and James M. Bunting, contends that plaintiffs take but a life estate, and that the children of plaintiffs take the remainder *per stirpes*, in fee, and therefore that said minor defendants represented by him take each an undivided one-fourth of said estate in fee simple, subject only to the life estate of the plaintiffs.

"That Otto K. Perrin, guardian *ad litem* for the minor defendant, Mildred T. Richardson, contends that by the terms of said will the plaintiffs and their children take said estate in fee simple as tenants in common, and that therefore said minor defendant, Mildred T. Richardson, is the present owner in fee simple of an undivided one-eighth of said estate.

"That the foregoing contentions arise by reason of section II of the will above set forth.

"That on the issues so joined, the court found, as to title, generally in favor of the plaintiffs and that they are the sole owners in fee simple, as tenants in common of said estate including the premises described in the petition; to which said guardians *ad litem* duly excepted.

"That by agreement of the parties the question as to partition shall be suspended, and that this appeal be taken on the question of title only and presented as a case stated, as provided by paragraph c of rule 9 of the supreme court of Nebraska."

We have carefully considered the record and find the same to be free from prejudicial error. The judgment of

the district court that plaintiffs are the sole owners in fee simple, as tenants in common of the estate, is right and it is therefore

AFFIRMED.

STATE OF NEBRASKA ET AL., APPELLANTS, V. OLIVER BROTHERS, APPELLEES.

FILED JANUARY 24, 1930. No. 26996.

1. Waters: DEPARTMENT OF PUBLIC WORKS: DISCRETION. "The department of public works is an administrative body, having quasi judicial functions, and is invested with reasonable discretion in the exercise of its supervisory powers." *In re Application of Babson*, 105 Neb. 317.
2. ———: WATER RIGHTS: ABANDONMENT. "'Abandonment' is the relinquishment of a right by the owner thereof, without any regard to future possession by himself or any other person, but with the intention to forsake or desert the right." *Union Grain & Elevator Co. v. McCammon Ditch Co.*, 41 Idaho, 216.

APPEAL from the district court for Hayes county: CHARLES E. ELDRED, JUDGE. *Affirmed.*

Scott & Scott, for appellants.

Cordeal, Colfer & Russell, contra.

Heard before GOSS, C. J., ROSE, DEAN, GOOD, THOMPSON and EBERLY, JJ., and LANDIS, District Judge.

DEAN, J.

F. C. Krotter, plaintiff, filed a complaint before the department of public works, hereinafter called the department, seeking to have the water rights of the defendants, Oliver Brothers, canceled. Number 1284 is the appropriation number. The application for cancelation is based on the alleged ground that the water had not been used by the defendants for more than three years immediately last past. After a hearing before the department the complaint was dismissed. Thereupon the plaintiff appealed to the district court for Hayes county and the decision of the department was there affirmed and Krotter's appeal was dismissed.

Plaintiff has brought the record to this court to have it reviewed.

Counsel for the defendants Oliver contend that the appeal was improperly taken to the district court, and that this court therefore is without jurisdiction over the appeal. It is their contention that section 8428, Comp. St. 1922, under which this complaint was filed, does not provide for a proceeding between individual claimants of water but pertains to complaints originating with the department, and that the plaintiff should have appealed directly to this court from the department's decision as provided in sections 8433 and 8434, Comp. St. 1922. Section 8428, above cited, among other things, provides for an examination and hearing by the department of the condition of any water appropriation which does not appear to have been used for more than three years. The same section also provides for an appeal from the decision of the department to the district court for the county in which the point of diversion of such water appropriation is situated. Section 8433 provides that the department shall have jurisdiction over all matters pertaining to water rights and shall have power to hold public hearings on complaints in regard thereto. And section 8434 provides for an appeal to the supreme court by any party aggrieved by the decision of the department. After the complaint was filed by plaintiff, the department appointed a time and place of hearing and served notice on the defendants, as provided in section 8428. Since the inquiry proceeded under section 8428, which provides that "an appeal may be taken from the decision of the department of public works upon said hearing to the district court of the county in which the point of diversions of such water appropriation is situated," as above noted, we think the district court did not err in overruling the special appearance of the defendants.

Application number 1284, filed by the defendants, has a priority date of April 28, 1913, and is a permit to divert 55 cubic feet of water per second from the Frenchman river near Wauneta, the water to be used in the operation of a pumping plant for irrigation purposes. The plant requires

a dam not to exceed eight feet in height and is located in the SE¼ of SW¼ of section 7, township 5 north, range 35 west of the 6th P. M., in Hayes county. In a report filed by C. E. Franklin, hydrographer, June 25, 1927, it appears that the canal has been undermined by high water in the ravine and that the dam was almost completely ruined in 1922. The defendants began repair work to fill in the channel and by means of sheet piling, between which brush, rock, and earth were placed, the channel was closed to the height of the dam, except for a small leak. It appears from the report of the hydrographer that much money has been expended by defendants for concrete work done in 1926 in an attempt to repair the dam.

From the evidence of Walter J. Oliver, one of the defendants, it appears that in the fall of 1923 new walls were constructed on the dam, and again in 1924 more work was done by the defendants, and it became necessary to "back the water about five feet to get it back over the original dam." The total cost of repair work during the summer of 1924 was $3,800. Mr. Oliver also testified that in 1925 it was necessary for them to hire men to work 75 days to fill 2,000 yards of dirt into the dam and otherwise repair it, and that $650 was expended by them for labor in this behalf. And he further testified that more dirt was used in 1926 to fill in the banks.

An engineer who had charge of the dam when it was constructed testified in respect of the effort made by the defendants to repair the dam and operate the plant since it was washed out. It appears that approximately 200 acres of land were irrigated by the plant during the years it was being operated.

It must be conceded that the department of public works is an administrative body, having quasi judicial functions, and that as such it is invested with reasonable discretion in the exercise of its supervisory powers. *In re Application of Babson*, 105 Neb. 317.

In *Union Grain & Elevator Co. v. McCammon Ditch Co.*, 41 Idaho, 216, the court held: "'Abandonment' is the relinquishment of a right by the owner thereof, without any

regard to future possession by himself or any other person, but with the intention to forsake or desert the right."

And in *Gould v. Maricopa Canal Co.*, 8 Ariz. 429, it was held: "Abandonment of the right to water gained by appropriation is a matter of intent as such intent may be evidenced by the declaration of the party or as may be fairly inferred from his acts."

There is nothing in the record that tends to establish that the defendants intended at any time to abandon the irrigation system now here under discussion. The evidence discloses that they have done much repair work on the dam and that no effort was spared to continue the operation of the plant for irrigation purposes and that they have done all that could reasonably be required of them in the premises.

The judgment of the learned trial court is

AFFIRMED.

STATE OF NEBRASKA ET AL., APPELLANTS, V. OLIVER BROTHERS, APPELLEES.

FILED JANUARY 24, 1930. No. 26997.

For syllabus see *State v. Oliver Bros.*, *ante*, p. 302, which is controlling herein.

APPEAL from the district court for Hayes county: CHARLES E. ELDRED, JUDGE. *Affirmed.*

Scott & Scott, for appellants.

Cordeal, Colfer & Russell, contra.

Heard before GOSS, C. J., ROSE, DEAN, GOOD, THOMPSON and EBERLY, JJ., and LANDIS, District Judge.

DEAN, J.

This is a companion case to *State v. Oliver Bros.*, *ante*, p. 302. In the present case it was stipulated and agreed by and between "the attorneys that the evidence at the hearing held under Application No. 1284 should be used as

the record of hearing under water appropriation Application No. 1285." Our decision in Application No. 1284 is controlling in this case and the judgment of the district court is therefore

AFFIRMED.

W. M. CLARK, ADMINISTRATOR, APPELLEE, V. ALICE E. ROBINSON ET AL., APPELLANTS.

FILED JANUARY 24, 1930. No. 26945.

Record examined and found to be controlled by the law announced in *Robinson v. Clark, ante*, p. 285.

APPEAL from the district court for Johnson county: JOHN B. RAPER, JUDGE. *Reversed and dismissed.*

Frederick J. Patz and *Lewis C. Westwood*, for appellants.

Jay C. Moore, contra.

Heard before GOSS, C. J., ROSE, GOOD, THOMPSON, EBERLY and DAY, JJ., and THOMPSEN, District Judge.

THOMPSON, J.

This is the proceeding *in rem* referred to in *Robinson v. Clark, ante*, p. 285. The parties, the lands, and the allowed Kansas claims involved in the two proceedings are the same. In the instant proceeding the district court found in favor of the administrator, appellee, and on November 28, 1928, entered judgment as prayed, and ordered the lands in question sold (subject, however, to the life estate of Alice E. Robinson, mother of deceased) and the proceeds applied in payment of the allowed Kansas claims, with interest and costs. Appeal is had to this court by Alice E. Robinson and Hattie M. Sandusky. The facts, as well as the issues, involved herein are disclosed in our opinion in *Robinson v. Clark, ante*, p. 285, thus rendering further detail unnecessary.

From an examination of this record, we conclude that, as to the issues and the facts, the law announced in our opinion in *Robinson v. Clark, ante*, p. 285, is controlling

herein. In *Fischer v. Sklenar*, 101 Neb. 553, cited and followed by us in *Robinson v. Clark, ante*, p. 285, we held: "The final determination of such fact (that of heirship) by the probate court is binding upon all parties interested in the estate, unless it is set aside upon appeal." This is true also as to the barring of claims under the heirship statutes as affecting the involved lands. Thus, as we have found in *Robinson v. Clark, ante*, p. 285, that the judgment rendered by the county court was right, it is binding on all interested parties, and has been from the date of its entry, to wit, June 30, 1928.

The judgment of the district court in this instant proceeding is set aside and the cause dismissed at the costs of the appellee.

REVERSED AND DISMISSED.

GOOD, J., dissents.

HARDIN TRUST COMPANY, APPELLANT, V. J. C. WOLLARD ET AL., APPELLEES.

FILED JANUARY 24, 1930. No 26969.

1. **Bills and Notes:** HOLDER IN DUE COURSE. A payee, taking a negotiable instrument, which is not negotiated, with knowledge that certain of the apparent makers thereof are in fact sureties who signed under an agreement with such payee that certain moneys were to be applied, when received and as received, to the payment of the instrument, is not as to such sureties a holder in due course.
2. ———: ACTION: DEFENSES. Further, in an action on such instrument by the payee against the apparent makers, the defense of suretyship and agreement may be interposed by such sureties under our negotiable instruments act.
3. **Appeal:** HARMLESS ERROR. "A judgment will not be reversed on appeal, when it clearly appears that the alleged error complained of does not effect the substantial rights of the complaining party." *State v. Quimby*, 104 Neb. 590.
4. **Record** examined, and verdict of the jury found to be the only one that could, within reason, have been returned under the evidence reflected.

APPEAL from the district court for Franklin county: J. W. JAMES, JUDGE. *Affirmed.*

D. A. Thompson, Thomas Robertson, and *J. S. Gilham,* for appellant.

C. P. Anderbery and *Leon Samuelson, contra.*

Heard before GOSS, C. J., ROSE, GOOD, THOMPSON, EBERLY and DAY, JJ., and FOSTER, District Judge.

THOMPSON, J.

The Hardin Trust Company, appellant, a banking institution, hereinafter called the bank, brought this action on a promissory note, negotiable in form, dated September 17, 1921, payable six months after date, such appellant being the payee named therein, against the defendants, appellees, they being apparent makers, to recover the sum of $5,000 with interest thereon from March 27, 1925. Trial was had to a jury, verdict returned in favor of the bank and against defendant Wollard for the full amount claimed, and in favor of each of the defendants Hevner against the bank, on which judgment was rendered. To reverse this judgment appeal is had.

The claimed errors presented, considering the brief of appellant and the "Additional Brief of Appellant," are, in substance, that the judgment is contrary to law; that the court erred in giving instructions 2 and 4, respectively; that the judgment is contrary to the evidence; and that the court erred in overruling the motion for a new trial.

The petition is in usual form, except the statement therein that the interest had been paid up to March 27, 1925, which payment is shown by the indorsement on the note to have been made by a trust deed dated February 7, 1925. The note contained the clause "and authorize extension of time by payment of interest." Each of the defendants filed a separate answer, which, being very similar, have been by us considered together, and in substance such answers alleged that defendant Wollard signed the note, and after it was signed by the Hevners later, it was delivered to the

bank at its request under the conditions hereinafter set forth; denied that there was any consideration running to either of the Hevners therefor, or that they signed the note other than as sureties, Wollard receiving the entire consideration; denied further that payment of interest had been had as alleged by the bank, or otherwise, or that the time of payment had been at any time extended, with Wollard's knowledge or consent, or that of either of the Hevners; further, that the note was barred by the statute of limitations; that such note was signed by the Hevners under a promise to them by the bank, before and at the time of their attaching their respective signatures thereto, and as an inducement therefor, that if they would sign the note with Wollard, as sureties, it, the bank, would, whenever certain lands involved were traded or sold, first apply the proceeds on the note in liquidation thereof, and not to any other or different purpose up to the time such note and interest had been paid; further, that the Hevners, relying upon the aforesaid inducement and in furtherance thereof, signed the note as such respective sureties; that, after the note was delivered to the bank under the above arrangement, moneys belonging to Wollard came into the bank's possession and under its control from the sale, exchange and rental of lands to the amount of more than $15,000; that the bank, contrary to its promise and over the protest of Wollard, and without the knowledge or consent of either of the Hevners, applied the same to the payment of other indebtedness owing to it by Wollard, as well as to indebtedness owing to and held by other banks against Wollard, and secured by the names of relatives of the cashier of the bank, and that by reason thereof the Hevners were damaged to the extent of the face of the note sued on, together with all interest thereon; further, that by reason thereof such Hevners were released as such sureties.

The reply to each of such answers, so far as material under the record before us, was a general denial; further, that the provisions in the note authorized the extension of time of payment with or without the knowledge of the Hevners, or either thereof, by payment of interest by Wollard; that

such payment of interest was made by Wollard, and thus tolled the statute of limitations. These affirmative allegations stood denied under the Nebraska rules of pleading.

On the issues as thus presented, the jury found as hereinbefore indicated.

Section 4801, Comp. St. 1922, is called to our attention as precluding the Hevners from proving that each signed as sureties and not as makers. The section, considered as a part of an independent act, as it is, does not warrant such conclusion. It provides: "The person 'primarily' liable on an instrument is the person who by the terms of the instrument is absolutely required to pay the same. All other parties are 'secondarily' liable." This does not prevent one appearing as a maker of a promissory note from alleging and proving that he signed as a surety, in a proceeding between the original parties on a note not negotiated. The section is dealing solely with the promissory note or instrument as it appears in its legal relation to the parties as by it disclosed, and does not necessarily prevent one who appears to be a maker or payor from showing by proof in a proper case his actual status. The different provisions of this act must be considered together, and if possible each of its nearly 200 sections be permitted to function in its own sphere in furtherance of the purpose and intent of the act.

The following cases will be found instructive: *Bank of Commerce & Savings v. Randell*, 107 Neb. 332; *Farmers State Bank v. Lydick*, 112 Neb. 586.

The instant case, as we have seen, is one between the original parties to the note, each acting with full knowledge of the facts, and in a transaction wherein the payee bank was the inspiring cause of the execution and delivery of the note, hence it is not, and could not be, a holder of the note in due course. While the note is negotiable in form, it has not been "negotiated" within the meaning of the negotiable instruments statutes. Hence, as we conclude, these parties are governed, as to their rights and relationship to each other, by that part of section 4669, Comp. St. 1922, which reads as follows: "In the hands of any holder other than

a holder in due course, a negotiable instrument is subject to the same defenses as if it were nonnegotiable." And they are governed further by the rule laid down by us in *Hatfield v. Jakway,* 102 Neb. 831, wherein we construed the above quoted statutory provision, and announced: "A payee who takes a negotiable instrument with knowledge that one of the signers is only signing as a surety, and who agrees that certain collateral pledged to secure the note shall first be applied before the surety shall be liable, is not a 'holder in due course' as respects such agreement with the surety."

Without going into detail, it may be said that the evidence reflected by the record fully sustains the finding of the jury. In fact, the proof is so clear and convincing that no other verdict could, within reason, have been returned. This is true as to the inducing promise made to the Hevners, their reliance thereon, the breach thereof by the bank as charged, and resulting damage to them as proved under the alleged facts. Hence, it becomes unnecessary to consider the other claimed errors presented, as under this reflected situation no substantial right of the bank can be said to have been affected by reason of these errors, if found to be such. Comp. St. 1922, sec. 8657; *Maxson v. J. I. Case Threshing Machine Co.,* 81 Neb. 546; *State v. Quimby,* 104 Neb. 590; *In re Estate of Nebel,* 106 Neb. 302; *Bryan v. Manchester,* 111 Neb. 748.

It may be added, further, that each of the aforesaid wrongful applications of moneys by the bank might be regarded as a "payment," as such wrongful use in each instance served to reduce the liability of the sureties *pro tanto.*

The judgment of the trial court is right, and is in all things

AFFIRMED.

LOUIS BELZ, EXECUTOR, APPELLANT, V. CHICAGO & NORTHWESTERN RAILWAY COMPANY ET AL., APPELLEES.

FILED JANUARY 24, 1930. NO. 26951.

1. **Railroads: INJURY AT CROSSING: CONTRIBUTORY NEGLIGENCE.** Under the facts in this case, where a driver of an automobile on a highway failed to exercise reasonable care in looking for an approaching engine before crossing a railroad track, when his view was unobstructed, it was such negligence as will preclude a recovery, even though the engine which collided with his automobile was running behind a freight train.
2. ———: ———: **INSUFFICIENCY OF EVIDENCE.** The diverting circumstance of a freight train passing the deceased just previous to his being struck by a lone engine is not sufficient to justify the submission of the case to the jury, in the absence of any evidence that he could not see or hear the approaching engine before crossing the railroad track.

APPEAL from the district court for Stanton county: CHARLES H. STEWART, JUDGE. *Affirmed.*

Sanden, Anderson & Gradwohl, for appellant.

Wymer Dressler, R. D. Neely and *Hugo Lutz, contra.*

Heard before GOSS, C. J., GOOD, THOMPSON, EBERLY and DAY, JJ., and FOSTER and SHEPHERD, District Judges.

FOSTER, District Judge.

The plaintiff, Louis Belz, executor of the estate of Alis Belz, deceased, brought this suit to recover damages growing out of an accident which caused the death of Alis Belz, and which occurred at a point in Stanton county, Nebraska, where the highway crosses the railroad track of the Chicago & Northwestern Railway Company.

It appears that the deceased was driving his automobile west on the highway and, as he was crossing the railroad track, was struck by a lone engine which was following a freight train. The accident occurred in the daytime, and the deceased had an unobstructed view to the east along the railroad for at least a mile. The highway upon which the

deceased was traveling follows the railroad to the crossing from the east for several miles.

All of the witnesses testified that they heard the engineer on the lone engine give the usual signal by whistle as he approached the crossing and most of them say that the bell was ringing.

The plaintiff claims that the defendants were negligent in operating a lone engine so close behind a train and not giving the proper signal of its approach, and that the freight train which had just passed the deceased was such a diverting circumstance as to excuse him in attempting to cross the track.

The defendants claim that the deceased was guilty of gross contributory negligence in not keeping a proper lookout for approaching trains and in not seeing and hearing the engine which struck him, when there was nothing to obstruct his view of, or prevent him from hearing, the approaching engine.

We cannot agree with the plaintiff's interpretation of the question of negligence. The deceased had a plain, unobstructed view of the railroad, and could have seen the engine in plenty of time to avoid the collision, if he had looked. The engineer gave the usual signals with the whistle. The alleged negligence of the railway company in running a lone engine so close behind a freight train is overcome by the gross negligence of the deceased in not looking and listening before he attempted to cross the track.

Our court has several times held that, where the facts show beyond reasonable dispute that the plaintiff's negligence was more than slight as compared with the negligence of the defendant, it is the province of the court to direct a verdict for the defendant. *Allen v. Omaha & S. I. R. Co.*, 115 Neb. 221; *Dodds v. Omaha & C. B. Street R. Co.*, 104 Neb. 692.

The question of whether or not the engineer rang the bell, when it is shown by nearly all the witnesses testifying that he blew the whistle, is not sufficient in itself to submit

the case to the jury, because a signal was given which the deceased could have heard if he had listened.

Where a traveler on a highway failed to exercise a reasonable care by not looking and seeing an approaching engine, where he had an unobstructed view of the railroad, it is such negligence as will defeat a recovery, even though no signal was given with bell or whistle. *Moreland v. Chicago & N. W. R. Co.*, 117 Neb. 456.

The plaintiff depends upon the case of *McGhee v. White*, 66 Fed. 502, 13 C. C. A. 608, wherein it was held that a railroad company was guilty of negligence sufficient to submit the case to a jury, where the plaintiff drove upon the track with a horse and wagon, and was struck by a train which was closely following another train. The evidence in the *McGhee* case shows that the plaintiff could not see the approaching engine until he was within 20 feet of the track, and that his view was obstructed up to that point. Such a state of facts does not exist in the case at bar. The deceased had an unobstructed view of the railroad.

It is shown beyond reasonable dispute by the testimony offered by the plaintiff and by the circumstances surrounding the collision that the negligence of the deceased was more than slight as compared with that of the defendants.

It was the duty of the court, therefore, to withdraw the case from the jury and enter a judgment for the defendant.

The judgment of the district court is

AFFIRMED.

IN RE ESTATE OF JOSEPH M. SIDES. EMMA SIDES, APPELLEE V. J. H. HUMPE, ADMINISTRATOR, APPELLEE: MARY A. GRANT ET AL., APPELLANTS.

FILED JANUARY 24, 1930. No. 26761.

1. **Gifts.** The mere reservation of interest to the donor during his lifetime does not invalidate the gift. *Novak v. Reeson*, 110 Neb. 229.
2. ———. Where a father, during his lifetime, gives money to each of his children by a former marriage and immediately thereafter takes from each a promissory note for the full amount

of the money so given, made payable to himself and bearing interest at the rate of 4 per cent. per annum, but containing the written provision that such note should be canceled on the death of the payee and not be a claim against the maker, and where such payee during his lifetime delivers the note to a third person in trust, with directions to him to collect and remit to him the interest during the lifetime of the payee and on his death to surrender the note to the maker, and where such payee thereafter never exercises any dominion or control over the note, such a transaction, after the death of the payee and as against the surviving widow seeking to hold such note as a part of the payee's estate, will be construed as an absolute gift *inter vivos* of the money so given, and not in any sense testamentary in its nature. In such a case, the note given will be regarded merely as evidence of the agreement whereby the donor reserves to himself an annuity equal to 4 per cent. of the gift during his lifetime, and the maker will not be bound beyond the plain provisions of such agreement.

3. ———. Evidence as to the alleged gift of other notes examined and discussed and *held* insufficient to show intent to make a gift.

4. **Husband and Wife:** PERSONAL PROPERTY. Under the statute, and the decisions of this court, as to his personal property, the husband, if competent, during his lifetime is wholly unrestricted in the enjoyment of all the incidents and attributes of ownership, except as limited by section 2550, Comp. St. 1922.

5. ———: GIFTS: VALIDITY. On the issue of fraud presented in this case, evidence examined and discussed and *held* insufficient to sustain the findings and judgment of the district court.

6. **Evidence** reviewed and *held* to require a reversal of the judgment of the district court.

APPEAL from the district court for Lancaster county: WILLARD E. STEWART, JUDGE. *Reversed.*

J. E. Porter, for appellants.

Burkett, Wilson, Brown & Wilson and *C. C. Flansburg, contra.*

Heard before GOSS, C. J., ROSE, DEAN, THOMPSON and EBERLY, JJ., and CHARLES H. STEWART, District Judge.

STEWART, District Judge.

Joseph M. Sides died testate, a resident of Lincoln, Nebraska, on the 9th day of February, 1927. He was twice

married. His first wife died in 1890, the mother of nine children. These, as well as two grandchildren, are involved in this litigation. The second wife and surviving widow is the appellee, Emma Sides. No children were born to this marriage.

By the last will of the said Joseph M. Sides, executed on the 1st day of February, 1923, the surviving widow was given an undivided one-fourth interest in the estate, and the remaining three-fourths was divided into nine parts, one part of which went to each of eight of his children and one part was divided between a daughter and her son and daughter, grandchildren of the testator, each receiving one-third thereof. The estate left by Sides, including the homestead and excluding the notes in controversy, was of the value of $40,215.12, consisting largely of bonds, securities, etc. The notes in dispute aggregate the sum of $41,444.

The surviving widow elected to take under the statute, and not under the will.

In June, 1923, Mr. Sides turned over to his children the sum of $4,000 each. In the case of one of the children, however, the sum of $4,000 was divided between such child and her son and daughter, each receiving a one-third part thereof. There were three classes of distribution: (a) Where the full $4,000 was paid in cash or draft; (b) where part of the $4,000 was paid in draft and cash and the remainder by application upon a note owed by the particular child to the father; (c) where it was paid by the application of the $4,000 upon a note owed by the child to the father.

It is sufficient for this preliminary statement to say that in each instance a note was given by the party to whom money or credit was given. There were eight notes for $4,000 each and three notes aggregating $4,000, making a total of $36,000 of notes. These were all ordinary negotiable demand notes, drawing 4 per cent. interest, and in each note there was written the following clause: "This note to be canceled at the death of Joseph M. Sides and not to be a claim against the undersigned." This provision ap-

peared in the notes at the time they were signed by the makers.

At the time the will was drawn, there were two other notes payable to Mr. Sides. One signed by a daughter, Mary A. Grant, and her husband, on which there was a balance due of $3,000, and one signed by a son, Lawrence Sides, and his wife, on which there was a balance due of $2,400. Neither of these notes contained the provision for cancelation appearing in the notes executed in June, 1923.

This suit was commenced in the county court of Lancaster county by the filing of pleadings by the parties. These will be referred to later. From the findings and orders there made and entered, all parties appealed to the district court for Lancaster county, where a jury was waived and the case tried to the court on the original pleadings and the final report of the administrator. There was a general finding for the petitioner, and that each and all of the notes involved in the controversy were a part of the estate of Joseph M. Sides, deceased, and should be a charge against the respective makers thereof. Judgment was entered on these findings. From an order overruling separate motions for new trial the respondents have appealed to this court.

The pleadings are long and we shall refer only to such essential averments as are necessary for an understanding of the questions presented.

The widow by her petition alleges that all the notes in controversy are the property of the estate, and that the notes signed in June, 1923, notwithstanding the provision for the cancelation contained therein, should be found and held to be a part of said estate for the following reasons: (1) Because said provision for cancelation appearing in said notes was not authorized by the said Joseph M. Sides; (2) because said provision, under the circumstances of the execution, delivery and holding of each of said notes, if authorized, was testamentary in character and void; (3) because, under the laws of the state of Nebraska, the said Sides did not have the power and authority to give the amount of money represented by these notes to the signers thereof without the consent of the petitioner, his wife, for

the reason that the giving of the said notes would be a fraud upon the surviving widow and contrary to the laws of the state of Nebraska. The prayer was that all of said notes be found and decreed to be a part of the estate and owing to said estate by the respective makers thereof.

The respondents filed answer to this petition, denying generally the allegations therein contained, and affirmatively pleading that the administrator is wrongfully in possession of said notes; that the notes executed in June, 1923, were executed by the respective makers thereof upon the express condition and provision for cancelation contained in said notes, and were delivered by the said Joseph M. Sides to one John Hansen, in trust to collect the interest and pay same to the said Joseph M. Sides during his lifetime, or to credit payment of interest thereon when instructed so to do by the said Joseph M. Sides, during his lifetime, and that at his death said notes should be and become canceled and void and delivered up by said Hansen to the respective makers thereof for cancelation; that said conditional notes were executed by said respective makers upon the express understanding and agreement by and between the said Joseph M. Sides, the respective makers thereof, and the said Hansen, that said notes would be so delivered to and held by said Hansen as and for the purpose hereinbefore alleged, and that they were so held by said Hansen pursuant to said delivery to him and said agreement, and that they were surrendered to said administrator with will annexed, after the death of Joseph M. Sides, without the knowledge or consent of the said Hansen or of the respective makers thereof, and the same are void and should be ordered returned to said Hansen for cancelation and surrender to the makers in accordance with the said contract and the terms of delivery to him and the trust under which he held the same. The same allegations are made with respect to the other two notes in question, except it is admitted that these notes do not contain the written provision for cancelation. It is further alleged that said notes are not assets of said estate, but were gifts

made in good faith by said Joseph M. Sides to said respective makers.

Reply was filed by petitioner denying matters set forth in the answer.

It conclusively appears from the evidence that the provision for cancelation appearing in the notes executed in June, 1923, was placed in said notes before the signing thereof with the knowledge and by the express direction of Mr. Sides; that he actually turned over to each of the children the sum of $4,000, in cash or credit, during his lifetime and before the execution of said notes, is also fully established. The only direct competent evidence contained in the record as to what was actually done with these notes after their execution and delivery to Mr. Sides is to be found in the testimony of the witnesses, Hansen, June Sides, and Mrs. Scott Sides. Other testimony received on that subject was that of incompetent witnesses, made so by the statute as it relates to transactions and conversations with deceased persons in this class of cases.

This testimony as a whole establishes the contention of the appellants that, after the execution thereof by the Sides children, these notes were deliverd by Mr. Sides to Hansen, with directions that the interest thereon be paid to him or credited as by him directed during his lifetime, and that in case of his death the notes should be canceled and returned to the makers thereof. The testimony of Hansen further shows that he received these notes pursuant to this delivery and under these instructions, and that in obedience to his trust he held them until after the death of Mr. Sides. It appears that after the death of Sides, upon some order of court, the bank owning the deposit box containing said notes delivered them to the administrator. This was done without the knowledge or consent of either Hansen or the makers of the notes. It further is established by the evidence that Mr. Sides never had possession of any of these notes after he turned them over to Hansen. There is some evidence suggesting that the delivery of the notes by the bank to the administrator was upon some agreement or

stipulation that the notes should be held by the administrator pending final determination of court proceedings.

It thus appears clearly established by the record in this case that Sides himself, Mr. Hansen, and all the children who received the money and gave the notes did everything within their power to carry out the arrangement claimed by appellants. There is no direct evidence offered by appellee in denial of this testimony as to what was said and done concerning the notes executed in June, 1923. It is pointed out by appellee that Mr. Sides did not deliver these notes to Hansen immediately upon their execution, but took them back to Lincoln with him and did not turn them over to Hansen until some time later, and that when he did receive the notes Hansen placed them in a safety deposit box in some bank in his home town in the western part of the state, the box being one owned by Mr. Sides and one to which Sides, as well as Hansen, had access. There were no other papers in the safety deposit box. A sufficient answer to this would be that Mr. Sides never thereafter exercised any dominion over said notes and never at any time did anything inconsistent with the delivery claimed by the appellants. On the other hand, the delivery of the notes to Hansen at Lincoln for the purpose of carrying out the trust claimed by appellants was the natural and necessary thing to do if the intention of Mr. Sides, as expressed in the notes, was to be carried out.

In this state of the record, we cannot agree with counsel for appellee that anything in this entire transaction between Sides and his children was testamentary in its nature. The intention to make an absolute gift is too apparent to be seriously questioned. Sides did everything he could to carry this into effect. It must be remembered that the thing given was the money. But for the notes, this would have constituted an absolute, irrevocable and completed gift during the lifetime of Mr. Sides, with no reservation of interest therein to himself. The notes were merely evidence of the agreement whereby the father reserved to himself during his lifetime an annuity equal to 4 per cent. of the amount of the gift. As such a contract,

it created a species of life estate, and like any other trust or declaration of that nature could not bind the maker any further than the plain terms of the instrument itself provides. The delivery of the notes to Hansen during the lifetime of Mr. Sides in trust, as hereinbefore set out, was sufficient to entirely remove the transaction from that class of transfers known to the law as testamentary. *Dinslage v. Stratman,* 105 Neb. 274. The mere reservation of interest to the donor during his lifetime does not invalidate the gift. *Novak v. Reeson,* 110 Neb. 229.

We therefore conclude that, as to the conditional notes executed in June, 1923, there was an absolute and completed gift of the $4,000 to each of his children by Mr. Sides during his lifetime and that said children became fully vested with title thereto; that the said notes are no part of the estate of Joseph M. Sides, deceased, and the administrator is in the wrongful possession thereof, unless, as contended by the appellee, the gift was made by the father with the intent to defraud his surviving widow and was made under such circumstances as to amount to fraud, either constructive or actual, against her under the laws of the state of Nebraska. This branch of the case will receive our attention later.

It must be conceded that the evidence of intention to make a gift of the two remaining notes in controversy is much less convincing. In the first place, the notes themselves contain no provision for cancelation or other written words from which such intent could be gathered. Further than this, they were executed and delivered to Mr. Sides, for a consideration theretofore paid, and were in his possession prior to and at the time of the making of his will in 1923. While it is probably true that the will could affect only such property as the testator owned and controlled at the time of his death, yet we think one provision in this will is very helpful in arriving at the intent with which Sides later on delivered these particular notes to Hansen. The provision is as follows:

"From time to time heretofore I have made loans of money to several of my children, taking their notes therefor.

It is my will and I hereby direct that the sums of money so loaned shall be considered as an advancement and so constitute a part of my estate, and shall be charged to each of such children respectively as an advancement; except and unless, the notes themselves shall provide that they are to be canceled upon my death; in which event, it is my will that said notes shall be canceled; that the sums so given to said children shall not be considered an advancement, but as a gift, and shall not be or become a part of said estate."

These considerations lead us to the conclusion that it was never the intention of Mr. Sides to make a gift of these two notes, or the debt thereby evidenced, to the makers thereof. The matter of the distribution of his property received the careful thought and attention of this man. He consulted counsel with regard to these transactions and apparently took a long and no doubt tedious trip to the western part of the state to make sure that every detail of his proposed bounty was carried out according to his wishes. It is inconceivable that at this time the matter of making definite arrangements for the gift of these two notes was overlooked if he had any such intention. It is more probable that these notes were delivered to Hansen merely to facilitate the collection and indorsement of interest thereon.

From the record before us as to these two notes, we conclude that neither of them was ever lawfully transferred by Mr. Sides during his lifetime, or that he ever had any intention of making a gift of them to the makers thereof; that they are a part of the Sides estate, and, as such, properly in the possession of the administrator thereof, valid and enforceable obligations of the makers thereof.

Finally, we are called upon to consider the issue of fraud presented.

On the question of the effect of the transfer of personal property by a husband during his lifetime which operates to diminish the distributive share the wife would otherwise have in the estate, there is some slight conflict in the decisions of the several states. This is due, no doubt, to the statutory provisions of the several states covering the matter of the wife's right to an interest in the property of the

husband. However, substantially all authority is to the effect that the question of good faith is controlling. If the transfer of personal property by the husband during his lifetime is a mere device and means by which he retains to himself the use and benefit of the property during his lifetime, and at his death seeks to deprive the widow of her distributive share, it is to be regarded as fraudulent as to the wife. No more favorable statement of the rights of the wife in this state is warranted either by our statute or the decisions of this court. As to his personal property, the husband, if competent, during his lifetime is wholly unrestricted in the enjoyment of all the incidents and attributes of ownership, except as limited by section 2550, Comp. St. 1922. No cases directly bearing on this question are cited in the briefs and we have been unable to find any case decided by this court where the precise question has been determined. However, a reading of the Nebraska statute on the subject removes all question as to the correctness of the rule just announced. In the case of *Allen v. Henggeler*, 32 Fed. (2d) 69, the circuit court of appeals for this district, in passing upon the Nebraska statute, in an opinion by Judge McDermott, states the rule substantially as here stated.

On the issue of fraud presented, the burden of proof is upon the surviving widow to establish by a preponderance of the evidence that, in making these gifts to his children, the father was actuated by bad motive and fraudulent intent, and that the entire transaction was a mere device by which he sought to defraud her. *Krull v. Arman*, 110 Neb. 70. It is the general rule that fraudulent intent is not presumed, but must be proved by the party asserting it.

Upon a careful study of all the testimony, we are unable to see where any finding of fraud is supported by the record in this case. In arriving at this conclusion, we have taken into consideration the relationship of all the parties; the amount of the Sides estate and its history as shown by the evidence; the value of the gifts; the time and manner of making them and the extent to which the children participated. It is important to remember that here a father was

dealing with his wife and children, both having legitimate claim to his affections. It is not denied, and the evidence clearly shows, that the first wife and her children made large contribution to this estate. To the one it represented patient self-denial; to the other, denied opportunity. It is not strange, as shown by the evidence, that this mother, about to say goodbye to her loved ones, should remind the husband of his duty to her children in the matter of the final disposition of his property. Common fairness would prompt him to respect her wishes. It nowhere appears from the evidence that this father bore toward these children anything other than natural love and affection. It is but natural to assume that in the closing days of his life this old man, in memory, returned often to the scene of his early struggles and lingered long with the devoted young wife who so willingly surrendered herself to every demand of poverty and young romance. Here again, no doubt, were rekindled the smoldering fires of parental devotion. Inspiration was not lacking, and these gifts appear to have been prompted by generous motives arising naturally from the relationship of parent and child. Under all the circumstances, it cannot be said that these gifts were unreasonable, but rather they appear to have been in complete accord with the natural inclinations of the human heart. In the absence of positive fraud, such disposition of property will not be disturbed. It is not for the courts to say how a man shall bestow his bounty, so long as he acts in entire good faith with those having legitimate demands upon him. In the present case, the widow cannot complain because she did not receive more, so long as she is given that portion of her husband's property to which, at the time of his death, she is entitled under the Nebraska statute.

The evidence is insufficient to support the findings and judgment of the district court. The judgment of the district court is therefore reversed and the cause remanded for further proceedings.

REVERSED.

INTERNATIONAL MILLING COMPANY, APPELLANT, V. NORTH PLATTE FLOUR MILLS ET AL., APPELLEES.

FILED JANUARY 30, 1930. No. 26925.

1. **Sales:** UNIFORM SALES ACT. The "Uniform Sales Act" of Nebraska prescribes rules of law which must govern any case coming within its provisions. It was passed in response to a general desire for substantial uniformity in the legislation of the different states in all branches of commercial law, and its provisions must be enforced and its principles must be recognized as wholly independent of and to the exclusion of inconsistent descisions and doctrines declared by the courts of this state prior to its enactment. This act expressly provides that, "where any right, duty or liability would arise under a contract to sell or a sale by implication of law, it may be negatived or varied by express agreement" of the parties to such transaction.
2. ———: ———: CONSTRUCTION. It is mandatory that this act shall be so interpreted and construed as to effectuate its general purpose to make uniform the laws of those states which enact it.
3. **Damages:** CONTRACT: BREACH: LIQUIDATED DAMAGES. Under the terms of the Nebraska "Uniform Sales Act," where it appears from the provisions of the contract for the sale of flour that the parties did not contemplate that the seller had the flour on hand but that he should manufacture it in the future for delivery within a period named in the contract from wheat to be purchased by him for the purpose, it was competent for them to stipulate, on the basis of the transaction contemplated, what the measure of damages should be in the event of a breach by the buyer.
4. **Evidence** examined, and *held* to support a recovery of damages by plaintiff in accordance with the terms of the contract set forth and in the amount as therein provided.
5. **Appeal.** The question as to the effect of unconscionable, inequitable, or unjust stipulations in contracts of sale relating to the measure of damages in the event of breach is not presented by this record, either by pleadings or evidence, and hence not determined.

APPEAL from the district court for Lincoln county: J. LEONARD TEWELL, JUDGE. *Reversed.*

H. L. Hoidale and *William E. Shuman,* for appellant.

Beeler, Crosby & Baskins, contra.

Heard before GOSS, C. J., ROSE, GOOD, THOMPSON, EBERLY and DAY, JJ., and THOMSEN, District Judge.

EBERLY, J.

This was an action brought in the district court for Lincoln county by the plaintiff, appellant, against the defendants, appellees, to recover damages claimed to have been sustained by reason of the breach of a written contract of sale between the parties dated September 18, 1926. The pleadings disclose that the parties entered into a contract of sale at that time whereby the plaintiff agreed to sell the defendants 1,000 barrels of flour at $7.45 a barrel to be delivered at North Platte "on or before May 1, 1927, on directions to be furnished by the buyer." It is also conceded that the defendants ordered out and received 250 barrels of this flour. However, they failed and neglected to furnish shipping directions for the remaining 750 barrels of flour as required by the contract and thus prevented the performance thereof by the plaintiff, seller. This written contract of sale included an agreement by the parties thereto as to the manner in which the amount of damages suffered, in the event of a breach of the contract by either of them, should be determined. The express terms of this instrument covering this subject are as follows:

"Paragraph 3. As to any of the above wheat flour remaining unshipped by reason of buyer's breach or default, seller shall recover from buyer liquidated damages as follows: (a) A sum equal to 4¢ multiplied by the number of bu. of wheat required to make such unshipped flour, figuring 4¾ bu. to the bbl. of flour; plus (b) a sum equal to 1¢ multiplied by the said number of bu., which sum shall be calculated for each 30 days, or fraction thereof, intervening between date hereof and date of breach; plus (c) amount of decline, if any, per bu., from date hereof to date of breach, in highest closing price, at Mpls., of number 1 Northern Spring wheat, multiplied by said number of bu. In case of a rise in such price of such wheat between said dates, instead of a decline, seller shall recover the sums at (a) and (b), above, less a sum determined by

multiplying amount of such rise, per bu., by said number of bu. such prices on date hereof and date of breach being taken to ascertain amount of decline or rise per bu. Any carrying charges paid by buyer to seller on such wheat flour only shall also be deducted from seller's said recovery. If there is neither rise nor decline in such price seller shall recover the sums at (a) and (b) above, less such carrying charges paid, if any."

"Paragraph 6. But if specifically written on face hereof that buyer shall furnish shipping directions, buyer shall be obligated to notify seller of date, or dates, for shipment, which shall not be later than 'shipping date;' also quantity and (if within style of package, if any specified, is not desired) package, or assortment, wanted, and he shall take out (without previous request) all of within goods as aforesaid, and his failure or refusal so to do shall give seller right, as to any of within goods remaining unshipped by reason thereof, to either: * * * (c) treat contract as broken by buyer and cancel contract (as to such unshipped goods only), at 5 o'clock p. m., Central time on 'shipping date,' and recover, on such unshipped goods, damages as set out in paragraph 3, construing date of such cancelation to be date of breach."

An analysis of the pleadings of the parties herein, and of the record made at the trial in the district court, discloses that the real issue presented in this case is the contention on behalf of the plaintiff, seller, that the provisions of the contract quoted are valid and enforceable as constituting liquidated damages; while the defendants, buyers, in their argument in this court, contend that these provisions amount to and constitute a penalty and as such are unenforceable. The defendants' pleadings, however, present even a narrower issue. Therein they admit the execution of the contract sued on, the continued ability and readiness to perform the same on the part of the plaintiff, the breach thereof by themselves, which they do not attempt to justify, save and except as they deny that damages were occasioned thereby in excess of nominal damages, one cent, which they expressly admit. On this issue the trial

was had in the district court. At the conclusion of the plaintiff's evidence, the defendants, without offering any evidence in support of their contentions, moved for an instructed verdict in their favor. The plaintiff thereupon made a like motion. The court then discharged the jury and entered judgment for the plaintiff, but limited the recovery to nominal damages, viz., one cent. To review this determination the plaintiff now submits the cause to this tribunal.

The record discloses that ample competent evidence was tendered by the plaintiff to support the allegations of the petition and to justify a recovery as prayed, should the legal question involved be determined in its favor. It will be noted that the district court, as a matter of law, expressly held the contractual provisions quoted unenforceable as being a penalty.

The Nebraska "Uniform Sales Act," which is carried in the Compiled Statutes for 1922 as sections 2470 to 2549, inclusive, duly adopted and approved April 25, 1921, is the controlling legislation on this subject. As a valid enactment by our legislature, its terms supersede any conflicting principle in our judicial decisions previously pronounced. It may be said that the original source of this legislation is the "Sale of Goods Act" which was duly adopted by the parliament of Great Britain in the year 1893. The provisions of this act, it may be noted in passing, while containing exceptions and variations, are substantially similar to our present statute on that subject. As a result of this British legislation a movement in the United States toward uniformity of laws relating to commerce, which was national in its scope, resulted in the adoption of uniform sales acts, in terms identical with our own, in the following of our sister states on the dates named: Alaska, January 2, 1914; Arizona, April 1, 1907; Connecticut, July 17, 1907; Idaho, January 1, 1920; Illinois, June 29, 1915; Iowa, April 25, 1919; Maryland, June 1, 1910; Massachusetts, January 1, 1909; Michigan, April 22, 1913; Minnesota, June 1, 1917; Nebraska, April 25, 1921; Nevada, April 1, 1915; New Jersey, May 7, 1907; New York, September 1, 1911;

North Dakota, March 10, 1917; Ohio, January 1, 1909; Oregon, February 22, 1919; Pennsylvania, January 1, 1916; Rhode Island, July 1, 1908; South Dakota, March 3, 1921; Tennessee, July 1, 1919; Utah, June 15, 1917; Vermont, April 1, 1921; Wisconsin, January 1, 1912; Wyoming, February 20, 1917. Our own sales act, passed and approved in 1921, thus adopted an enactment which, in many of its precise terms, had previously been construed by the courts of our sister states. The rule of construction under this situation is, where the legislature reenacts laws of other states, it thereby adopts the judicial constructions which have been placed thereon by the highest courts of such sister states. *Coffield v. State*, 44 Neb. 417; *Forrester v. Kearney Nat. Bank*, 49 Neb. 655; *State v. Cornell*, 54 Neb. 647; *Kendall v. Garneau*, 55 Neb. 403; *Goble v. Simeral*, 67 Neb. 276; *Fadanelli v. National Security Fire Ins. Co.*, 113 Neb. 830. With this principle of construction in view, it may be said that it was determined in New York in 1916 and 1918 that by the New York act on this subject, which is identical with our own: "It was the design as far as possible to make our law uniform with the legislation and laws on this subject existing throughout the country. To this end changes were made in what had been previously here the law." *Rinaldi v. Mohican Co.* (1918) 225 N. Y. 70, affirming (1916) 157 N. Y. Supp. 561. The supreme court of Ohio had likewise determined, with reference to their sales act, identical in terms with our own: The act prescribes rules of law which must govern any case coming within its provisions. *State v. Bayer*, 93 Ohio St. 72. And again with reference to this same act the supreme court of Ohio in 1917 declared: "This is 'an act to establish a law uniform with the laws of other states on sales.' It was passed in response to a general desire for substantial uniformity in the legislation of the different states on all branches of commercial law. It is of high importance that everyone should know his rights and his obligations at all times and all places in connection with every transaction in which he engages. Every law that has been passed in furtherance of that object should have its provisions en-

forced and its principles recognized wholly independent, and to the exclusion, of inconsistent decisions and doctrines previously declared. In this way only can the desired uniformity be sustained." *Sheffield-King Milling Co. v. Domestic Science Baking Co.*, 95 Ohio St. 180. Not only do the requirements of the ordinary rule of construction heretofore announced by this tribunal require that the enactment now under consideration be construed in harmony with the previous decisions rendered by the courts of our sister states prior to its adoption here, but the terms of the act itself disclose that such was the express mandate of the legislature adopting the same, for in section 2543, Comp. St. 1922, we find the following clause: "This act shall be so interpreted and construed, as to effectuate its general purpose to make uniform the laws of those states which enact it."

In substance, all of the terms of the contract of sale here in dispute were before the supreme court of Ohio in the case of *Sheffield-King Milling Co. v. Domestic Science Baking Co., supra.* That court cited as controlling in the case before it sections 8444 (3) and 8451 of their Code, which are identical with sections 2533 (3) and 2540, Comp. St. 1922, which are as follows:

Section 2533 (3): "Where there is an available market for the goods in question, the measure of damages is, in the absence of special circumstances, showing proximate damages of a greater amount, the difference between the contract price and the market or current price at the time or times when the goods ought to have been accepted, or, if no time was fixed for acceptance, then at the time of the refusal to accept."

Section 2540: "Where any right, duty or liability would arise under a contract to sell or a sale by implication of law, it may be negatived or varied by express agreement or by the course of dealing between the parties, or by custom, if the custom be such as to bind both parties to the contract or the sale."

The Ohio court in the case last above referred to sustained the contract and a recovery thereunder on behalf of

the seller against a defaulting purchaser, computed in like manner as provided in the contract presented in our instant case. Similar contracts were sustained and like recoveries permitted in the following cases: *International Milling Co. v. Reierson,* 55 S. Dak.—; *Christian Mills v. Berthold Stern Flour Co.,* 247 Ill. App. 1; *Shane Bros. & Wilson Co. v. Striglos,* 228 Ill. App. 397; *New Prague Flouring Mill Co. v. Hewett Grain & Provision Co.,* 226 Mich. 35; *H. H. King Flour Mills Co. v. Bay City Baking Co.,* 240 Mich. 79. It will be further noted that each of the decisions above cited were made in states which had prior thereto adopted the uniform sales act and each were made while that act was in full force and effect and though this legislation may not have been referred to by the judges writing the opinions, still the decided harmony with the principles of the uniform sales act, characterizing the language of these decisions, supports the conclusion that the terms of that legislation must be deemed at least presumptively controlling. But it is also true that in no state having adopted this legislation, so far as we have been able to ascertain, has a recovery on this class of contracts ever been denied. Indeed, if the words of this statute, "This act shall be so interpreted and construed, as to effectuate its general purpose to make uniform the laws of those states which enact it," are to be given their natural force and effect, it would seem that the requirement of a similar construction of our own "Uniform Sales Act" in the present case cannot be avoided.

It is to be noted that the terms of our statute expressly authorize the parties to a sales contract, or agreement to sell, "where any right, duty or liability would arise under a contract to sell or a sale by implication of law, it may be negatived or varied by express agreement." It may be said "to vary" means to change to something else. In determining the force and effect of this statute it is to be noted that similar language, when standing alone and applied to other subjects, has been held to justify and authorize almost any change without limitation. *Merchants Loan & Trust Co. v. Northern Trust Co.,* 250 Ill. 86. So far as

we have been able to ascertain, courts in applying this statute to actual transactions have not disclosed any tendency to modify or restrict the natural import of the language thus employed. *Renne v. Volk,* 188 Wis. 508. However, the issues presented in the instant case do not require a definition of the scope of the statutory language under consideration. The pleading of the defendants admits that a situation existed which was created by their default and imposed a liability upon them to respond in damages therefor. The defendants do not affirmatively allege that the provisions of the contract quoted are as a matter of fact "unconscionable." We can give force and effect to the statute referred to only if it be conceded that this liability of defendants, whatever its extent, was subject to be varied by express agreement, and that such agreement existed was pleaded on the part of the plaintiff in its petition and admitted on the part of the defendants in their answer. The defendants' defense to recovery is based upon the rule of damages which existed prior to the adoption of our sales act, but to sustain this contention is to, by construction, invalidate the express terms of the statute which provided that the question of measure of damages was a matter of contract between the parties. The validity of the contract, it will be noted, is unchallenged by the pleadings or otherwise, save and except the assertion of an existing rule of damages which is contrary to the provisions agreed upon by the parties. Indeed, the pleadings in themselves do not advise us whether it is claimed that the provisions of the contract quoted involve a recovery of more or less than would arise in a case where the rule of law contended for by the defendants was applied. In fact, the conclusions of the district court are expressly based on its finding that there is no evidence in the record as to what the damages computed under the rule contended for by the defendants would amount to. This by fair implication denied to the parties to the contract where any right, duty or liability arose thereunder, the right to negative or vary such liability by express agreement. On this subject the Ohio court in 1917, having then under consideration a contract con-

taining provisions similar to the one here presented under the terms of its sales act, employed the following language:

"It must be noted that this contract was not silent on the subject. It contained an 'express agreement' touching the 'liability.' It provides that the basis of settlement shall be 'the actual difference between the highest closing price of No. 1 Northern wheat in Minneapolis on the date of sale and date of cancelation as shown by the "Minneapolis Market Record," figuring four and one-half bushels of wheat for every barrel of flour, the buyer to reimburse the seller for carrying the wheat at the rate of one cent per bushel per month from date of sale to date of cancelation, plus two cents per bushel for buying and reselling the wheat, and two cents per bushel to cover loss of profit, *if any*, and inconvenience to seller resulting from failure of buyer to take out flour as per contract.'

"It is apparent from this language that the parties themselves contemplated that the plaintiff should not be required to speculate upon the price of wheat, whose fluctuating character must have been well known to both, but that the transaction should proceed on the idea that the plaintiff should purchase a sufficient quantity of wheat on the day of sale. Not only this, but it is apparent from the contract that the parties themselves contemplated that this wheat should not be at once manufactured into flour, but should be held or 'carried' until near the time when the plaintiff would be required to manufacture the flour from it. Otherwise the provision as to the highest closing price of No. 1 Northern wheat on the date of sale, and the provision to reimburse the seller for carrying the wheat at one cent per bushel per month and two cents for buying and *reselling* the wheat, would be wholly unnecessary and meaningless. Under the clause, 'and two cents per bushel to cover loss of profit, *if any*,' the plaintiff waived any claim.

"We think that a consideration of the whole instrument forces the conclusion that the contract did not provide for, and the parties did not contemplate, a direct sale of the flour as an ordinary commodity, as it might have done if the parties had so desired; but it provided for, and they

contemplated, the purchase of the wheat at once and the future manufacture and delivery by the plaintiff of the amount of flour within the period covered by the terms of the contract. With these steps in contemplation the parties contracted that defendant should reimburse plaintiff for any loss on account of the purchase of the wheat in case defendant refused to take the flour, or 'fails to furnish directions for shipment.' The parties in this case were fully competent to contract. Each was fully able to consider and provide for his own interest. It is not claimed that there was any fraud or circumvention in connection with the negotiation, and we can conceive of no injustice, or inequity, in the enforcement of the terms of a contract thus made, which contemplated the purchase by the seller of sufficient wheat to supply the commodity to be manufactured and delivered thereafter during a period of a number of months. The parties agreed that wheat, the thing from which the flour was to be made, should be the basis upon which to calculate damages. They could, of course, have agreed that the flour should be such basis, but they did not do so. That was a matter for them to agree about. They did not fix an arbitrary lump sum which might turn out to be wholly inequitable, but fixed a method, the chief element of which was the price of wheat from which the flour was to be made, a matter not within the control of either. In this situation when the plaintiff proved it had performed the terms of the contract on its part, had purchased the necessary wheat, and showed the damages that had accrued on the basis agreed on, it was entitled to recover." *Sheffield-King Milling Co. v. Domestic Science Baking Co.*, 95 Ohio St. 180.

This language is applicable to the proceedings in this case and we adopt it as controlling. In so doing we follow, not only the dictates of reason, but the express commands of our statute which directs uniformity, and the object of it was to secure for everyone the possibility of knowing his rights and obligations at all times and all places in connection with every transaction in which he engages which pertains to or is governed by the "Uniform Sales Law."

We do not overlook the fact that the defendant relies upon the case of *Russell Miller Milling Co. v. Bastasch*, 70 Or. 475. This case, it will be noted, was decided at a time when Oregon had not adopted the "Uniform Sales Act," hence, it could have no application here. It may be said, however, that this case was also considered by the supreme court of Ohio in the case of *Sheffield-King Milling Co. v. Domestic Science Baking Co., supra,* in which that court employed the following language, which we adopt:

"In *Russell Miller Milling Co. v. Bastasch,* 70 Or. 475, relied on by defendant in error, it is held: 'In an action for a breach of contract to purchase flour, a custom of the plaintiff on purchases for future delivery of setting aside a quantity of wheat sufficient to be manufactured into the flour ordered cannot be considered, where the parties are not shown to have contracted with reference to it and no knowledge of it is imputed to the defendants in either pleadings or evidence.' That was an ordinary suit for damages and did not involve the question made here as to liquidated damages or penalty. In the case we have here, it will also be noted, the plaintiff does not assert a 'custom' but an express contract, in which the parties *are* 'shown to have contracted with reference' to the basis of settlement."

It follows therefore that the district court, in denying plaintiff recovery of liquidated damages grounded by the contract in suit, erred. The judgment of the district court is therefore reversed and the cause remanded for further proceedings in harmony with this opinion.

REVERSED.

STATE, EX REL. O. S. SPILLMAN, ATTORNEY GENERAL, V. DUNBAR STATE BANK ET AL., APPELLANTS: C. L. KELLY, COUNTY TREASURER, INTERVENER, APPELLEE.

FILED JANUARY 30, 1930. No. 26941.

1. **Banks and Banking:** DEPOSITORY BOND: EXPIRATION. Where a depository bank gives a bond to the county under the law as existing previous to the amendment of 1927, as in this case, to

secure public funds deposited by the county treasurer in its bank, such bond expires with the term of the county treasurer and does not apply to funds deposited by his successor, even though under the terms of such bond it runs for a period beyond the term of the outgoing treasurer.

2. ———: ———: ———. The bond given by the depository bank in this case did not apply to the funds deposited by the incoming county treasurer, and, therefore, could not be considered as funds otherwise secured, within the meaning of section 12, ch. 30, Laws 1925, nor could such funds be considered as deposited by reason of a collateral agreement under section 39, ch. 191, Laws 1923.

3. ———: GUARANTY FUND: LIABILITY. "Where a county treasurer deposits public funds in a state bank in excess of 50 per cent. of the paid-up capital stock of said bank, the entire deposit is within the protection of the depositors' guaranty fund." *State v. Peoples State Bank*, 111 Neb. 136.

APPEAL from the district court for Otoe county: JAMES T. BEGLEY, JUDGE. *Affirmed.*

C. M. Skiles and *I. D. Beynon*, for appellants.

George H. Heinke, contra.

Heard before GOSS, C. J., GOOD, THOMPSON, EBERLY and DAY, JJ., and FOSTER and SHEPHERD, District Judges.

FOSTER, District Judge.

It appears that D. G. McAllister was county treasurer of Otoe county, Nebraska, from January 4, 1923, until January 7, 1927, and that on the latter date C. L. Kelly succeeded him. On January 4, 1923, McAllister designated the Dunbar State Bank of Dunbar, Nebraska, as a depository for county funds, and on the same date the board of county commissioners approved such bank as a depository for a term of four years.

McAllister, during all of his term, kept a deposit in the bank. On March 3, 1925, a depository bond was filed in the office of the county clerk of Otoe county for $25,000. This bond was approved by the commissioners on March 3, 1925. It is recited in this bond that it is for a period of two years, beginning on the 2d day of March, 1925, and ending on the 22d day of March, 1927; that thereafter, and

on the 24th day of December, 1926, the same bank filed an application to become a depository for a period of four years, beginning January 7, 1927. The board of county commissioners approved this application on January 7, 1927. No depository bond, however, was given at this time.

In pursuance to such approval, Kelly, then county treasurer, received the money on hand in the bank from McAllister, and transferred the account to his own name and continued to deposit and draw out money from such account during the months of January, February, March, and part of April, 1927. On April 6, 1927, Kelly had on deposit in the bank, as treasurer, the sum of $28,023.53. On April 6, 1927, the department of trade and commerce took charge of the property and affairs of the bank and remained in possession until April 23, 1928, at which time Dempster was appointed receiver by the court. While Dempster was in charge as agent of the state, a dividend amounting to 22 per cent. of the deposits was paid to the various depositors. The dividend check of $6,175.17, being 22 per cent. of the deposits held by the bank in the name of Kelly, as county treasurer, was held by Kelly to be delivered in case the court should so determine. Upon this state of facts, trial was had in the district court, and judgment entered to the effect that the 22 per cent. dividend on the deposit of Otoe county, amounting to $6,175.17, be paid to Kelly, and that the remainder, amounting to $21,848.36, be allowed as a preferred claim against the depositors' guaranty fund. The receiver appeals from this finding of the district court.

The state claims that the bond originally given was continuing and covered the funds deposited in the bank in Kelly's name, as well as those held under the name of McAllister, and such bond constitutes other security than the guaranty fund, under section 12, ch. 30, Laws 1925, and was a collateral agreement under section 39, ch. 191, Laws 1923; that this would place the deposit in a class where it would not be on the basis of other deposits, and would not receive dividends until the county had exhausted its resources against the bond.

The state further claims that the bond was given contrary to the statutes, in that the deposits made thereunder were for more than 50 per cent. of the capital stock and surplus of the depository bank, and was an illegal act on the part of the authorities of Otoe county, and, therefore, they cannot recover in a court of equity.

The intervener claims that the bond given was only for the term of county treasurer McAllister and could in no wise be considered a bond for his successor, county treasurer Kelly; that the funds were transferred from McAllister to Kelly upon the expiration of McAllister's term; that no bond, other securities, or collateral agreements were given or made to secure or induce Kelly or Otoe county to deposit funds in the Dunbar State Bank; that the intervener is entitled to the dividend already paid by the bank, and to the allowance of the balance of the claim as preferred against the depositors' guaranty fund.

It seems that, under the statutes of the state of Nebraska, bonds given by depositories cover only the term of the official and a new bond should be required for each official term. The time is definitely fixed by section 6193, Comp. St. 1922, and reads, in part, as follows:

"The bonds hereby required shall cover one term only and new bonds shall be required for each and every official term."

This section was amended by section 1, ch. 96, Laws 1925, as follows:

"The bonds hereby required shall cover one term of the county treasurer only and new bonds shall be required for each and every official term."

This law was further amended by section 4, ch. 34, Laws 1927, to read as follows:

"All bonds given to secure deposits of public money shall expire January 1st of each year."

The last amendment above quoted does not apply to the case at bar, because it was not in force until July of 1927.

It is evident under the law that the bond given in this case expired with the term of McAllister as county treasurer, and this would be January 7, 1927. The liability

under the bond ceased when McAllister retired and the funds were turned over to Kelly.

It is argued that the giving of a check by McAllister to Kelly was not a proper transfer of funds, and, therefore, the deposit in the Dunbar State Bank could not be considered as having been received by Kelly. We do not agree with this contention. The transfer was made upon the books of the bank, and checks honored by the bank, signed by Kelly. This court has passed upon the question of transfer of funds in the case of *Paxton v. State*, 59 Neb. 460, saying:

"One to whom a certificate of deposit, or other evidence of money in the custody of a solvent bank, has been transferred is as effectually invested with control and dominion of such money as though there had been a manual delivery of it to him."

We are of the opinion that there was a valid transfer of funds from McAllister to Kelly.

It is strongly contended by the state that the bond given is other security and also constitutes a collateral agreement and, therefore, takes the deposit in question out of the class of general depositors. We have already held that the bond in this case had expired and did not apply to the public funds deposited and held by county treasurer Kelly. It would necessarily follow that it would not be other security or a collateral agreement.

It is contended that the county treasurer violated the statutory provision in making a deposit of public funds in excess of 50 per cent. of the paid-up capital stock of the bank, and the deposit, not being a legal deposit, was not protected. This court has passed directly upon this question in the case of *State v. Peoples State Bank*, 111 Neb. 136, as follows:

"Where a county treasurer deposits public funds in a state bank in excess of 50 per cent. of the paid-up capital stock of said bank, the entire deposit is within the protection of the depositors' guaranty fund."

We think that this rule is applicable to the case at bar,

and that the public funds deposited by the county treasurer were protected by the depositors' guaranty fund.

A bond given to secure public funds deposited in a bank by a county treasurer expires with the term of such official and does not apply to deposits made by the new treasurer. Such bond, not being in force, could not be considered security for such funds, nor could it be considered a collateral agreement. The funds, being public moneys, receive the protection of the depositors' guaranty fund, regardless of the fact that such deposit was in excess of 50 per cent. of the paid-up capital stock of the depository bank.

The decree of the district court should be affirmed and judgment entered accordingly.

AFFIRMED.

ERNEST DODSON V. STATE OF NEBRASKA.

FILED JANUARY 30, 1930. No. 26950.

1. **Criminal Law: RAPE: EVIDENCE: RES GESTÆ.** While in a case of assault with intent to ravish, committed upon a 14 year old girl, only her complaint of the outrage shortly thereafter is ordinarily competent in evidence, and not her statement of the particular facts or of the name of her assailant, still, if said statement be within such time and under such circumstances as to be a part of the *res gestæ*, it may properly be received.
2. **Rape: IDENTIFICATION OF ACCUSED.** *Held* in this case that, though the witness could not positively and without a doubt identify the defendant, his evidence was sufficiently certain to go to the jury, and it was for the jury to determine as to the weight to which it was entitled.

ERROR to the district court for Adams county: J. W. JAMES, JUDGE. *Affirmed.*

J. E. Willits, for plaintiff in error.

C. A. Sorensen, Attorney General, and *Homer L. Kyle, contra.*

Heard before GOSS, C. J., GOOD, THOMPSON, EBERLY and DAY, JJ., and FOSTER and SHEPHERD, District Judges.

SHEPHERD, District Judge.

Plaintiff in error, hereinafter called defendant, a man of about 23 years of age, was charged with assault with intent to ravish a 14 year old girl, and was convicted. He assigns as reversible error that the court permitted the prosecuting witness to detail in her testimony what she told others of the alleged assault, and permitted one of such others to likewise detail what she said, and permitted a third witness for the state to express his opinion as to the identity of the defendant; all over his objections duly made.

The act occurred at the home of Mrs. Roberts, a sister of the defendant, whither the prosecuting witness had been sent with defendant to get some dishes for a wedding supper which defendant's mother was preparing to grace the nuptials of a younger daughter. The prosecuting witness lived with Mrs. Roberts, who was at the time assisting her mother at the latter's home.

The girl told a straightforward and convincing story of the assault, stating what occurred with great clearness and particularity: Arrived at the Roberts house and safe from observation within, the defendant seized her with one arm between her legs and the other about her waist and carried her kicking, screaming and fighting into a bedroom, where he laid her upon the bed, extended himself upon her and attempted to ravish her. By dint of superior strength he was able to, and did, overcome her, despite her most strenuous and continued resistence. Before he accomplished his purpose, however, and before he had proceeded to the point of penetration, she pretended to be about to faint and persuaded him to let her get a drink. From the kitchen, where he gave her a glass of water, she ran to the front door of the house and then to the back, seeking escape. In each instance he was too quick for her. Besought by him to "come on and be a good little sport," and again seized as before, she suggested that they first get a box from the cellar for the dishes. To this he finally assented and they started for the cellar, going out onto the back porch together and then, as he stooped to raise the trap-door at her direction, she sprang from the porch and ran to a nearby

grocery store, flinging herself down with head on the counter and weeping and declaring that a man was after her. She told the groceryman and his wife, who endeavored to reassure her, all that had happened, with many details that need not be set forth here. This story she repeated upon the stand; and the groceryman also detailed it when he was examined as a witness for the state.

Counsel for the defense made timely objection to this recapitulation by the girl and by the storekeeper, taking due exceptions, moving to strike the testimony and availing himself of every means to convince the court that the said testimony was as incompetent and prejudicial as a thorough knowledge of the criminal law and long experience in the practice could suggest.

The ordinary rule in cases of this kind is that the prosecuting witness may testify that she made complaint after the assault, and when, to whom and under what circumstances; but she may not detail the story that she told in making such complaint. And the person to whom she made complaint may also testify that she complained, and may state the time, place and circumstances of the complaint, but not what she said concerning the circumstances and details of the assault. The rule is well stated in *Oleson v. State,* 11 Neb. 276, and *Krug v. State,* 116 Neb. 185.

But these authorities recognize an exception in the case of words or statements which are of the *res gestæ;* and the court is of unanimous opinion that what the prosecuting witness said when she fled from her assailant, declaring that a man was after her and sobbing out her story to gain protection, was a part of the *res gestæ.*

Undoubtedly, the trial judge so considered in receiving the testimony; and he was right. The time was immediate, the girl was in tears and fear, was in the course of escape, and was in such state of mind that her words had all of the spontaneity that they would have had if she had been struggling in the grasp of the defendant and calling for help from bystanders—shrieking out the story of her assault to enlist sympathy and to secure succor. *State v. Gandel,* 173 Minn. 305; *Fields v. State,* 107 Neb. 91; *Sulli-*

van v. State, 58 Neb. 796; *Hewitt v. Eisenbart,* 36 Neb. 794; *Juckett v. Brennaman,* 99 Neb. 755.

The defendant denied the assault and denied that he was at the Roberts house on the day in question. A next door neighbor, a Mr. Perdew, testified in substance that upon coming home at noon of the day in question he saw a man at the rear of the Roberts home; that the man was getting into a car and leaving as he drove in, and that he was of opinion that said man was the defendant, whom he, Perdew, afterwards learned to know. He stated in his testimony that he could not tell positively because his attention was somewhat engaged by another car near at hand, but that he saw him sufficiently to give a description of him, and that his candid opinion was that he was Ernest Dodson, the accused.

The defendant objected to this testimony, though he did not move to strike it out.

The evidence is far from certain. But the rule is that one who knows another and has opportunity to identify him may testify as to his opinion, even though he states that he cannot testify positively, and that it will be for the jury to determine the weight of the testimony. In the case of *People v. Rolfe,* 61 Cal. 541, the witnesses expressed the belief that the defendant was the person they had seen, but did not positively and beyond doubt identify him. The testimony was received and the court held that the evidence was sufficiently certain respecting the identity of the defendant to go to the jury, and that it was for the jury to say what weight it was entitled to. This was in a robbery case and is quite directly in point.

In a Pennsylvania case, *Udderzook v. Commonwealth,* 76 Pa. St. 340, a nonexpert witness was permitted to testify to the handwriting of three letters charged to be written by one A. C. Wilson, though one of them was signed by another name. She testified concerning one: "I know this handwriting; it is that of A. C. Wilson to the best of my knowledge." As to another she testified: "This is also the character of A. C. Wilson's writing; I think it is his handwriting." As to the third she stated: "This also looks like

his, but it is not so distinct; to the best of my knowledge, it is his." This testimony was received, the weight of it being left to the jury. In the *Udderzook* case also, witnesses were permitted to testify to their opinion in identifying the mutilated remains from photographs in evidence. In the article in 16 C. J. 750, sec. 1536, is to be found a discussion, citing cases in support of the doctrine and justifying the ruling of the trial court in the case at bar. See, also, 1 Jones, Evidence (2d ed.) sec. 361.

The defendant seems to have had a fair trial. His rights were well guarded by able counsel, and there appears to be no reversible error in the record. The judgment and sentence of the district court must therefore be affirmed.

AFFIRMED.

IN RE ESTATE OF ALMIRA WHEELER. DOANE COLLEGE, APPELLEE, V. FILLMORE COUNTY, APPELLANT.

FILED JANUARY 30, 1930. No. 26816.

Taxation: INHERITANCE TAX: PLEDGES. Whether a pledge of money, payable at death of pledgor from his estate, is subject to an inheritance tax must be determined by the nature and character of and consideration for the pledge. If the pledge is not based upon a fair and valuable consideration but is, in effect and character, beneficent and donative, it is subject to the tax.

APPEAL from the district court for Fillmore county: ROBERT M. PROUDFIT, JUDGE. *Reversed and dismissed.*

Guy A. Hamilton, for appellant.

Perry, Van Pelt & Marti, contra.

Heard before GOSS, C. J., DEAN, GOOD and EBERLY, JJ., and RHOADES, SPEAR and TEWELL, District Judges.

SPEAR, District Judge.

Mrs. Almira Wheeler on February 2, 1926, made a pledge in the sum of $20,000 to Doane College. The pledge was in writing and is here set out:

"The Greater Doane Fund Estate Pledge.

"In consideration of my interest in Christian education, and the promises of like tenor and effect made by other subscribers to the funds of Doane College, I hereby pledge to Doane College at Crete, Nebraska, and will pay to its treasurer the sum of twenty thousand dollars ($20,000) upon the following terms and conditions:

"The interest on $5,000 to apply on a scholarship to aid worthy students; the balance of $15,000 to apply on endowment.

"1. This pledge shall be due and payable at the time of my decease and shall be paid out of the proceeds of my estate.

"2. It is understood and agreed that at any time convenient to myself, I may pay in full any unpaid balance of the principal sum of this subscription, after which I shall have no further obligation under this contract.

"Witness: Edwin B. Dean. Almira Wheeler.

"Witness: Chas. C. Smith.

"Date 2-2-26. Fairmont, Nebraska."

She died October 14, 1927, and the pledge was allowed as a claim against her estate. An inheritance tax was, by proper authority, assessed and paid under protest, and this is an action to recover the tax under the theory that it was unlawfully levied. The district court decided in favor of plaintiff, and the county appeals.

Doane College is a Nebraska corporation conducting an educational institution at Crete, Nebraska, having no capital stock, and is supported in the main by contributions. The statute under which the county seeks to assess the tax reads in part as follows:

"All property, real, personal and mixed, which shall pass by will or by the intestate laws of this state from any person who may die seized or possessed of the same while a resident of this state, or, if decedent was not a resident of this state at the time of his death, which property or any part thereof shall be within this state, or any interest therein or income therefrom, which shall be transferred by deed, grant, sale or gift made in contemplation of the death of

the grantor, or bargainer or intended to take effect, in possession or enjoyment after such death, to any person or persons or to any body politic or corporate in trust or otherwise, or by reason thereof any person or body corporate shall become beneficially entitled in possession or expectation to any property or income thereof, shall be and is subject to a tax, at the rate hereinafter specified." Laws 1923, ch. 187.

The county argues that this was a gift intended to take effect in possession or enjoyment after the death of the donor and therefore is subject to the inheritance tax. The college stoutly denies this, and says that the pledge constitutes a transfer for a valuable consideration, and is not taxable under the inheritance statute. Counsel for appellee further, by an ingenious process of elimination, arrives at the conclusion that this is neither a deed, grant, sale, or gift, and therefore not subject to the tax.

The contentions of each side must be measured by a single principle of law so all will be considered together. We must decide whether a contribution, such as this, passes when the pledge is signed and is therefore not subject to the tax, or whether the possession and enjoyment of the money takes effect after the death of the donor, and by that token it is subject to the tax. We have not been favored with any citations which are exactly in point, and no case has been decided by this court on the subject, so we must reason the case upon principle.

This court held in the case of *In re Estate of Griswold*, 113 Neb. 256, 38 A. L. R. 858, that a pledge similar to the one in question was supported by a consideration and collectible from the estate. Does this decision preclude the collection of the inheritance tax?

The books are full of cases from other states on this subject, and although helpful to us in deciding this case because of the principles therein stated, these cases are simply opinions of the various courts interpreting statutes. We are called upon to interpret the legislative meaning of our own statute. As we before remarked, no case involving the same circumstances has been called to our atten-

tion. The cases cited support the contentions of the respective parties by analogy only. *Blair v. Herold,* 150 Fed. 199, affirmed, 158 Fed. 804, is probably the classic example of the view taken by appellee. The circuit court of appeals said:

"A testator, his son and others entered into a partnership in 1890, the partnership agreement providing *inter alia* that, in consideration of a sum paid the testator by his son and other considerations moving from the other parties, in case of the testator's death during the existence of the partnership, it should not thereby be dissolved, but his interest therein should pass to and become vested in his son, and should remain in the business, his son taking his place. Testator died in 1899, during the partnership term, leaving a will, by which he made the son his residuary legatee. Held, that his interest in the partnership property passed to the son by a contract based on a sufficient consideration, and not by the will, and became vested in the son on the making of the contract subject to defeasance only in case testator lived beyond the partnership term, and that the property was not taxable under the war revenue act of June 13, 1898, c. 448, sec. 29, 30 Stat. 464 (U. S. Comp. St. 1901, p. 2307), as property 'transferred by deed, grant, bargain, sale, or gift made or intended to take effect in possession or enjoyment after the death of the grantor or bargainer,' the purpose of which provision was to prevent the evasion of the tax imposed on legacies and distributive shares, which purpose could not be imputed to a contract made so long before its enactment."

The district judge said that, as a valuable consideration was expressed in the contract, it was immaterial whether or not this consideration was adequate, and the property was not taxable. He remarked, however, that in any event it could not be said that the consideration was inadequate. He further said:

"My conclusion upon this branch of the subject, therefore, is that the partnership agreement was an irrevocable, self-executing contract; but whether self-executing or not, upon its delivery DeWitt C. Blair had vested rights there-

under in the interest of John I. Blair in the partnership property, defeasible only upon the survivorship of John I. Blair beyond the partnership period, which rights could not be divested by him by will or otherwise."

It is interesting to note that the circuit court of appeals, while approving the opinion of the district court, felt called upon to add:

"The purpose of which provision (in the statute) was to prevent the evasion of the tax imposed on legacies and distributive shares, which purpose could not be imputed to a contract made so long before its enactment."

In re Estate of Oppenheimer, 75 Mont. 186, 44 A. L. R. 1470, perhaps best expresses the opposite view, and was a case where, under an antenuptial contract, the wife, after the husband's death, was to be paid certain sums out of his estate. The court, in holding this property taxable, apparently takes the view that consideration is immaterial, and cites the following from *State v. Pabst*, 139 Wis. 561, as the view of the Montana court upon the subject:

"The statute was not intended to restrict persons in their right to transfer property in all legitimate ways, but it clearly manifests a purpose to tax all transfers which are accomplished by will, the intestate laws, and those made prior to death which can be classed as similar in nature and effect, because they accomplish a transfer of property under circumstances which impress on it the characteristics of a devolution made at the time of the donor's death."

Montana thus apparently holds that, regardless of consideration, if the transfer is intended to take effect in possession or enjoyment at or after death, it is taxable.

The middle ground is best expressed in the case of *Matter of Orvis*, 223 N. Y. 1, 3 A. L. R. 1636 (1918), wherein the court say, reviewing the former decisions of that court:

"The legislature did not intend that a purchaser who had paid full value for the property transferred should directly or indirectly pay the tax besides. We have not decided, however, that subdivision 4 of the section which we have quoted is applicable only to voluntary transfers or gifts which are within its conditions. *Matter of Keeney*,

194 N. Y. 281, 286. Its language does not permit that conclusion. It makes taxable a transfer by bargain or sale, when made in contemplation of the death of the grantor or vendor, or intended to take effect in possession or enjoyment at or after such death. The provision discloses a distinction in the legislative mind between a transfer by gift and a transfer by bargain or sale. It enacts, moreover, that transfers by bargain or sale should be taxable, or should not always and indiscriminately be nontaxable. The meaning of that enactment must be ascertained from the context and the object sought to be accomplished by the statute. The statute was not intended to restrict or burden the right of persons to transfer property in all legitimate ways and for all the usual and manifold purposes and objects of trade, commerce and purchase, or of voluntary transfers or gifts not made in contemplation of the death of the transferor, or intended to take effect in possession or enjoyment after such death. It was intended to tax all transfers which are accomplished by will, the intestate laws of this state, and those made or incepted prior to the death of the transferor in contemplation of or intended to take effect in possession or enjoyment after his death which are in their nature and character instruments or sources of bounty or benefaction and which can be classed as similar in nature and effect with transfers by wills or the intestate laws, because they accomplish a transfer of property, donative in effect, under circumstances which impress on it the characteristics of a disposition made at the time of the transferor's death. In all cases in which the value of the consideration for the property transferred, under the statutory conditions, is so disproportionately less than the value of the property transferred that the transfer is, in the light of reason or of ordinary intelligence and judgment, beneficent and donative, the transfer is taxable. The taxability does not depend upon fraud, or an attempt to evade the statute; nor does it depend upon the purpose or inducement of the transfer; nor does it depend upon the form given the transfer. The law searches out the reality, and is not halted or controlled by

the form. *Matter of Gould,* 156 N. Y. 423. The measure determining the liability or freedom from liability to the tax is the nature, the essence, the effect of the transfer. If, in truth, it, in effect, bestows, under the statutory conditions, a bounty or benefaction, and is not a transfer for money's worth, it is taxable.

"The application of the statute in the instant case leaves no ground for discussion. The mind does not hesitate in determining that the transfer was in essence and effect beneficent and donative, or in classing it as similar in nature and effect with transfers by wills."

In the above case the court held that, while the agreement rested upon a mutual and equal consideration and was enforceable, an inheritance tax could be assessed.

The above cited cases were decided upon statutes almost identical to ours as regards the point in issue. What did the Nebraska legislature intend? It seems to us that, without question, our legislature intended the middle ground adopted by the New York court. It must have intended that, while transfers effective upon death are not taxable when resting upon a valuable and adequate consideration, in all cases in which the value of the consideration for the property transferred, under the statutory conditions, is so disproportionately less than the value of the property transferred that the transfer is, in the light of reason or of ordinary judgment and intelligence, beneficent and donative, the transfer is taxable. We so declare the legislative intendment.

Having so found, let us proceed to the case at bar. The donor made the pledge payable at her death. She retained dominion over her property, and could have spent every cent of it before her death. She paid the taxes on it, and could have made 50 different pledges and all would have prorated in her estate, if her property was insufficient to pay all. She simply signed an agreement to pay $20,000 at her death. What did she receive as consideration? She received the satisfaction of having done a good deed. The college did not agree to keep its doors open or to do anything else. Without doubt everyone connected with the

transaction considered it a simple donation, payable at her death, and it would be illogical for us to hold otherwise. To say that the transaction rested upon such adequate and sufficient consideration as to preclude the assessment of an inheritance tax is to defeat the intention of the legislature. To say this, would open the doors to defraud the state. Any slight consideration would support a note payable at death and property used to pay the note could not be taxed. It has been said that the present case is analogous to this situation. If A owes B $1,000, and gives B a note, payable upon the death of A out of his estate, B should not be required to pay the tax. This is a false analogy, because A had a right to sue B, and, obtaining a judgment, levy upon B's property, then and there depleting B's estate. By taking the note he simply postponed the time of payment.

In the instant case Mrs. Wheeler owed the college nothing, and consequently the college had no right to deplete her estate. Not having that right, and being unable to enforce the pledge except out of her estate, and there being no adequate consideration, we think the college must pay the tax. In thus deciding we do no violence to the *Griswold* case, *supra*. In that case, in an opinion by Judge Redick, this court held that there was a consideration, and partially based its decision upon *Irwin v. Lombard University*, 56 Ohio St. 9, without reference to the case of *Ricketts v. Scothorn*, 57 Neb. 51, 42 L. R. A. 794, wherein Judge Sullivan, in discussing the *Lombard University* case, expressed the opinion that the true rule is that in such cases the defendant is precluded from denying the consideration under the doctrine of estoppel. Be that as it may, we in this case hold that, although the pledge was enforceable, the transfer of the money upon her death was donative, and therefore the college is subject to the tax.

For the above reasons, the judgment is reversed and the cause dismissed.

REVERSED AND DISMISSED.

STATE, EX REL. SAMUEL R. LOOMIS ET AL., APPELLANTS, V. CITY OF LINCOLN ET AL., APPELLEES.

FILED FEBRUARY 4, 1930. NO. 27265.

1. **Municipal Corporations**: ACTIONS OF CITY COUNCILS: CONSOLIDATION. Where a petition is submitted to a village board and contains the statutory signatures of 20 per cent. of the electors of such village, and the proposition therein contained is subsequently voted upon and carried by a majority of the voters at an election held therefor, the action of the city council, in the absence of fraud or mistake, in passing upon the validity of the proceedings should be considered final.
2. ———: ———. The trend of both recent legislation and decision has been toward a relaxation of the rule in respect to the procedure before official bodies chiefly political in their character and powers and only occasionally exercising judicial functions. *Wolfskill v. City Council of Los Angeles*, 178 Cal. 610.
3. ———: ———. "The rule of law is that, where any official body or tribunal, such as a city council, is given authority to hear and determine any question, its determination is, in effect, a judgment having all the properties of a judgment pronounced by a legally created court of limited jurisdiction." *People v. Ellis*, 253 Ill. 369.

APPEAL from the district court for Lancaster county: FREDERICK E. SHEPHERD, JEFFERSON H. BROADY and ELWOOD B. CHAPPELL, JUDGES. *Affirmed.*

Halleck F. Rose, George A. Adams and *Herman Ginsburg*, for appellants.

Frank A. Peterson and *Lloyd E. Chapman, contra.*

Heard before GOSS, C. J., DEAN, GOOD, THOMPSON, EBERLY and DAY, JJ., and PAINE, District Judge.

DEAN, J.

College View is located in Lancaster county and adjoins the city of Lincoln which has a population of more than 40,000 and less than 100,000 inhabitants. At an election holden April 2, 1929, the question of the consolidation of College View with Lincoln was submitted and voted upon by the electors of College View and the official returns disclosed that the consolidation carried by a majority of the

votes cast at the election. Thereupon the Lincoln city ordinance was duly amended so as to include College View within its boundaries as a part of the city.

Samuel R. Loomis, Charles A. Williams, Alfred C. Gourley, and Albert Hickman, relators herein, are members of the College View board of village trustees, and on June 14, 1929, as such officials, they filed an information in *quo warranto* in the district court for Lancaster county, directed against the city of Lincoln and certain of its public officers, as respondents, namely, Don L. Love, as mayor, and Ernest M. Bair, William Foster, William Schroeder, and Frank Harm, as members of the Lincoln city council, wherein the relators alleged that less than 20 per cent. of the qualified electors of College View, which the law requires, signed a petition for the submission of the question of proposed consolidation with Lincoln and that the subsequent election is therefore void and of no effect. The relators thereupon prayed that the respondents "be ousted and altogether excluded from the exercise of any authority or power of municipal government in and over the village of College View and the territory comprised within the territorial boundaries of said village as the same existed on and prior to April 29, 1929; that the relators be adjudged to be lawful incumbents and entitled to hold and exercise their offices as village trustees of the village of College View, and be restored to all their functions, rights and powers as such officers."

Three of the Lancaster county district judges, namely, the Honorables Frederick E. Shepherd, Jefferson H. Broady, and Elwood B. Chappell, sitting *en banc,* upon regular submission of the suit now before us on appeal, found that the petition contained the names of at least 20 per cent. of such qualified electors, as required by law, and that the election "was without fraud or mistake either on the part of the board of trustees or the election board." From the judgment so rendered the relators have appealed to this court.

The proceeding herein comes under the provisions of section 3790, Comp. St. 1922, which reads:

"Whenever a city of the second class or village adjoins a city of the first class having a population of more than forty thousand (40,000) and less than one hundred thousand (100,000), as well as other villages adjoining such city of the second class or villages or supplied in whole or in part with gas or with electric light or with street car service or supply from manufacturing or power plants and systems mainly located in and maintained and operated mainly from chief headquarters or offices within such city of the first class having a population of more then forty thousand (40,000) and less than one hundred thousand (100,000), then it shall be the duty of the officers of such cities of the second class and villages twenty days prior to such general city or village election to submit to the electors thereof at the first general city or village election after this act takes effect, and thereafter at any general city or village election whenever petitioned so to do by twenty per cent. of the qualified electors thereof, the question of the consolidation of such adjoining cities or villages with the city of the first class having a population of forty thousand (40,000) and less than one hundred thousand (100,000). Such question shall be submitted in substantially the following form, to wit:

" 'Shall the city of ——— be consolidated with the city of ——— having a population of forty thousand (40,000) and less than one hundred thousand (100,000)' or as the case may be 'shall the village of ——— be consolidated with the city of ———.'

"The ballot shall provide in the usual manner for a 'yes' and 'no' vote on the question."

On behalf of the relators a resident of College View testified that he was present when the petition for consolidation was submitted to the members of the village board and that at the time he informed the board that more than 67 of the persons whose names were written on the petition did not themselves sign the petition but that their names were written thereon, in some instances, by their wives, or by some other person without their knowledge or consent. This witness also testified that in his opinion the voting

population of College View at the time in question here consisted of about 2,500 persons and that the number of names on the petition was insufficient in that it was less than 20 per cent. of the qualified electors. He further testified that at the time the votes were counted he was ordered from the room and that, although the polls were closed at 8 o'clock, people were turned away from the polling booths at 7 o'clock and only those already in line were permitted to vote. Another witness, called by the relators, testified that at the election he made no objection to any of the proceedings nor did he hear any other person taking exceptions thereto.

From the evidence of the chairman of the board of trustees, who was called on the part of the respondents, it appears that, when the petition was considered, there was no objection made by any member as to its sufficiency. To substantially the same effect is the evidence of four or five others who were present at the board meeting. And the village clerk of College View certified that the petition contained 324 genuine signatures, and that such signatures represented 20 per cent. or more of the qualified electors of College View and that the petition was presented more than twenty days before the election as required by the statute.

An election judge who has been a resident of College View eight years testified that, as such election judge, he was present from the time the polls opened until they closed; that no ballots were misplaced nor were any destroyed; that when the polls closed the votes were counted and that 1057 votes were cast and the tally was correct and that, although the polls were closed at 7 o'clock, the line of people already there at the time were still voting at 8 o'clock. In respect of an incident wherein one witness complained that he was ordered from the room, this election judge testified that the witness was merely asked to step behind a railing so as not to interfere with the board in the counting of the ballots. And he denied that the election board, as charged, went away at any time and left the ballots uncounted at the polling place. Other members of

the election board testified to substantially the same facts. And one member of the board testified that about fifty people were present and watched the counting of the ballots and that no complaint was made at the time by anyone of any irregularities in the proceedings.

The relators offered in evidence an exhibit which purports to be a list of over 2,300 names of qualified College View electors, but on rebuttal this exhibit was withdrawn and another offered on which only 1,878 names were listed. The respondents, however, offered exhibits wherein it is clearly shown that there was only a total of 1,268 adult inhabitants resident in College View, at all times material to this suit, and without regard to their qualifications as voters. There is evidence tending to prove that a considerable number of fictitious signatures appeared on the relators' list of submitted names. To illustrate: One witness testified that his daughter was listed as a voter when in fact she had been away from College View four years and had never voted there. And it was disclosed that the names of school children and some deceased persons were all listed thereon as voters. The census taken by the respondents, however, discloses that a house to house canvass was made and, according to the evidence of the resident citizens who made the canvass, every adult inhabitant of the village was recorded and the total number, as noted above, disclosed only 1,268 adult inhabitants. In respect of the relators' list of inhabitants it totaled a much larger number, as above noted, inaccuracies occurred therein and in some instances names were duplicated and in others the names of persons who were deceased or had moved away were noted as voters.

In the decree rendered and subscribed by the three sitting judges to whom the case herein was submitted, *State v. Houston*, 94 Neb. 445, is therein cited wherein this language is used:

"The city clerk is required to ascertain and declare whether the requisite number of qualified signers have signed the petition for a recall election, and, in the absence of fraud or mistake, his determination thereof is not subject to review."

"The rule of law is that, where any official body or tribunal, such as a city council, is given authority to hear and determine any question, its determination is, in effect, a judgment having all the properties of a judgment pronounced by a legally created court of limited jurisdiction." *People v. Ellis*, 253 Ill. 369.

It does not appear to us that, in cases that may be pronounced political in trend or character, the extreme ultraniceties of technical rules of construction should be applied. In a somewhat similar case in California, the court said:

"We are of the opinion that the trend of both recent legislation and decision has been toward a relaxation of this rigid rule in respect to the procedure before official bodies chiefly political in their character and powers and only occasionally exercising judicial functions." *Wolfskill v. City Council of Los Angeles*, 178 Cal. 610.

The cited rule appears to be applicable to the facts in the present case. Where a petition is submitted to a village board and contains the statutory signatures of 20 per cent. of the electors of such village, and the proposition therein contained is subsequently voted upon and carried by a majority of the voters at an election held therefor, the action of the city council, in the absence of fraud or mistake, in passing upon the validity of the proceedings is final.

"Municipal corporations are created for the public good; are demanded by the wants of the community; and the law, after the long continued use of corporate powers, and the acquiesence of the public in them, will indulge in presumptions in support of their legal existence." *Jameson v. The People*, 16 Ill. 257.

In respect of the objections urged by the relators, it appears to us that they were properly passed upon by the three learned trial judges at the hearing, and we are unable to discover reversible error in the conclusions at which they arrived and the judgment rendered pursuant thereto.

The judgment is

AFFIRMED.

AK-SAR-BEN EXPOSITION COMPANY, APPELLEE, V. C. A. SORENSEN, ATTORNEY GENERAL, ET AL., APPELLANTS.

FILED FEBRUARY 7, 1930. No. 27172.

1. **Injunction:** SETTING ASIDE. A default and a resulting perpetual injunction may be set aside upon a motion supported by the tender of an answer stating a complete defense to the petition and sufficient evidence that defendant's failure to plead on or before the answer day was the result of excusable neglect on his part.
2. **Appeal:** DEFAULT: ABUSE OF DISCRETION. A final order that is the result of a district court's abuse of discretion in overruling a motion to set aside a default may be reversed on appeal to the supreme court.
3. **Injunction:** DEFAULT: ABUSE OF DISCRETION. Evidence outlined in opinion *held* sufficient to show an abuse of discretion by the trial court in overruling a motion to set aside a default and a resulting perpetual injunction.

APPEAL from the district court for Douglas county: JAMES M. FITZGERALD, JUDGE. *Reversed and cause retained until further order.*

Irvin A. Stalmaster, for appellants.

Mullen & Morrissey, Herman Aye and *Gaines, McGilton, Van Orsdel & Gaines, contra.*

Heard before ROSE, DEAN, GOOD, THOMPSON and EBERLY, JJ., and LANDIS, District Judge.

ROSE, J.

This is a suit in equity for an injunction. Plaintiff is the Ak-Sar-Ben Exposition Company, a Nebraska corporation organized to promote agriculture, to improve the breeding of live stock, to develop dairying, and to conduct expositions, stock shows, fairs and other forms of public entertainment, including horse races. Plaintiff maintains exposition grounds and buildings and a race track in Douglas county, at Omaha. Defendants are C. A. Sorensen, attorney general of Nebraska, whose residence and public office are in Lincoln, Lancaster county, and Henry J. Beal,

county attorney of Douglas county, whose residence and public office are in Omaha, Douglas county.

The petition describes the Ak-Sar-Ben Exposition Company, its incorporation, its purposes, its powers, its property, its obligations, its sources of income and its means of serving and entertaining the public without profit to itself, and contains other allegations to the following effect: Plaintiff is conducting horse races at its track in Douglas county. The present race meeting opened May 31, 1929, and plaintiff planned to continue it on week days up to and including July 4, 1929. To procure horses therefor plaintiff obligated itself for purses aggregating $165,000 and requiring daily disbursements of approximately $5,500. In raising and disbursing funds for purses and in conducting the races plaintiff alleges that it conforms to chapter 159, Laws of 1921, a Nebraska statute authorizing horse races, creating the state racing commission and providing, among other things:

"Any association or corporation, person or persons, or the owners of the horses engaged in such races, or others may contribute to purses or funds that shall be distributed on the basis of the result of the races, or prizes or stakes that are to be contested for, subject to the rules and regulations as fixed by the commission governing such contests. The intent and purpose of this act is that all horse racing held in the state shall be subject to the rules, regulations and control of said racing commission." Laws 1921, ch. 159, sec. 3; Comp. St. 1922, sec. 194.

In addition to the foregoing allegations, as outlined from the petition, plaintiff states in substance: Its sources of revenue are gate receipts, concessions and contributions to the purses and funds that are to be "distributed on the basis of the result of the races," the latter being the principal source of revenue. Contributions are made and disbursed pursuant to law under the rules, regulations and control of the state racing commission. Allegations summarized are followed by a paragraph of which the following is a copy:

"That the defendant, C. A. Sorensen, is the duly elected, qualified, and acting attorney general of the state of Nebraska; that the defendant, Henry J. Beal, is the duly elected, qualified and acting county attorney of Douglas county, Nebraska; that, notwithstanding the provisions of the laws of the state of Nebraska, and in particular the provisions of chapter 159 of the Laws of Nebraska for 1921, and the facts heretofore alleged in this petition, the defendants are severally threatening and intending to proceed against the plaintiff, its officers, servants and agents, and by criminal prosecutions, by injunctions and other legal proceedings, to interfere with, impede, and prevent the plaintiff from carrying on its business and, in particular, to prevent the plaintiff from conducting its business in so far as relates to the raising of purses and the distribution of the proceeds of the contributions, made by patrons in the manner that it is now doing, and, in this way, to prevent the plaintiff from receiving revenue from those contributing to purses or funds that are to be distributed on the basis of the result of the races; that the defendants have notified the officers and agents of the plaintiff that, if they do not immediately stop the present method of raising purses and distributing the proceeds on the basis of the result of the races, criminal proceedings will be commenced against the officers and that injunctions and other legal proceedings will be commenced against the plaintiff and its officers; that this action on the part of defendants is based on the assumption that the Act of 1921 is unconstitutional and that the method adopted by the plaintiff, with reference to accepting contributions and distributing purses to those who win the races, is in violation of the provisions of the Constitution, in that, it is either a lottery, a gift enterprise or a game of chance. The plaintiff alleges that the method adopted by it is not a lottery, a gift enterprise, or a game of chance."

To prevent defendants from carrying out their alleged threats and from interfering with plaintiff's methods of raising and disbursing funds in connection with horse racing, relief by restraining order and by injunction was prayed.

Plaintiff's petition was filed in the district court for Douglas county June 6, 1929. On that date a summons commanding service on defendant C. A. Sorensen, attorney general, was directed to the sheriff of Lancaster county and another summons commanding service on defendant Henry J. Beal, county attorney, was directed to the sheriff of Douglas county. The same day, June 6, 1929, Honorable James M. Fitzgerald, one of the judges of the district court for Douglas county, allowed a restraining order conforming to the prayer of plaintiff's petition and fixing June 10, 1929, as the date for the hearing of an application for a temporary injunction. The summons for defendant Sorensen and the restraining order were served in Lancaster county June 6, 1929, and the summons for defendant Beal and the restraining order were served in Douglas county on that date. The answer day fixed by the summons issued to the sheriff of Lancaster county was July 8, 1929. July 9, 1929, the day next following the answer day, there being no pleading on behalf of either defendant on file, Judge Fitzgerald entered a default against both defendants, made findings in favor of plaintiff to the effect that the facts stated in the petition are true, and "that it is not a violation of the law of Nebraska to bet on the results of horse races," and granted a perpetual injunction conforming to the prayer of plaintiff's petition. At the same term of court, four days later, July 13, 1929, defendant Beal filed a motion to set aside the default and the perpetual injunction and to permit a defense to the suit. The motion was accompanied by a showing in favor of opening the judgment and by an answer stating a complete defense to the petition. The motion was overruled by Judge Fitzgerald. Defendant Beal appealed to the supreme court.

The appeal presents for review the order overruling the motion to set aside the default, to open the decree granting the perpetual injunction and to permit a defense. Did the trial judge abuse his discretion and err to the prejudice of defendants? The determination of the question requires consideration of the petition, the motion, the showing, the

answer tendered with the motion, the entire proceedings resulting in the entry of the decree in equity and the evidence adduced on both sides of the controversy arising from the default.

According to the motion the delay in pleading to the petition on or before the answer day was attributable to plaintiff's failure to comply with a mutual understanding among counsel to take up the cause by agreement. Plaintiff resisted this ground of the motion, insisting that there was no agreement to postpone the hearing on the merits of the case and that there was no consent for delay that did not apply alone to a hearing on the application for a temporary injunction at the time fixed therefor by the district court, which was June 10, 1929. Two of plaintiff's counsel testified in effect that there was no agreement or mutual understanding to postpone a hearing on the merits of the case. Accepting this testimony without question, the evidence nevertheless tends to prove the following facts: By telephone at different times before answer day counsel for plaintiff conversed with the attorney general about the case. Neither plaintiff nor defendants asked for a hearing on the application for a temporary injunction June 10, 1929—the date fixed by the preliminary restraining order. The effect of such inaction on that date was to postpone the hearing for a temporary injunction. The nature of the pleading to be filed by the attorney general was mentioned in one of the conversations by telephone. By this means one of the counsel for plaintiff learned that the attorney general was undecided whether to demur or to answer and remarked that plaintiff could meet a demurrer without delay, but that an answer might require evidence and further time. By telephone these matters were subjects of conversation between counsel for plaintiff and the attorney general and were thus discussed before the default was entered. In one of the conversations by telephone the attorney general was informed there might be a contingency in which plaintiff itself would desire a brief postponement. The conversations by telephone, therefore, were not confined to the application

for a temporary injunction but extended beyond to pleadings relating to the merits of the case. No preliminary injunction was granted. While there was nothing in the conduct of plaintiff or its counsel to indicate bad faith on their part or an intention to mislead defendants into a failure to plead on or before the answer day, there were reason and authority to excuse the delay, when all the circumstances are considered.

The petition for a permanent injunction indicated the attorney general was of the opinion that plaintiff was operating a criminal lottery in connection with horse racing. In that petition plaintiff did not specifically explain to the court its principal method of raising and disbursing funds for the horse races. In the petition, however, plaintiff did make it clear that the attorney general did not agree to the alleged legality of the Ak-Sar-Ben's principal method of raising and disbursing money to support the horse races. The evidence before Judge Fitzgerald on the application for a perpetual injunction by default showed that the attorney general asked plaintiff to abandon that method, and, in the event of its failure to do so, expressed a purpose to interfere by invoking the processes of the law. A defense to plaintiff's suit in equity would be in harmony with the avowed purpose of the attorney general to enforce the laws against lotteries and gambling, as the chief law officer of the state understood those laws. A premise on which the petition for a perpetual injunction was based was the intention or threat of the attorney general to put a stop to the Ak-Sar-Ben's principal method of raising and disbursing money to continue the horse races. Equity may recognize a valid excuse, therefore, for the failure of defendants to plead to the petition on or before the answer day. Counsel for defendants, with convincing reason, as the record is viewed by the appellate court, relied in good faith, though mistakenly, upon what he supposed was an understanding that the case would not be taken up in his absence without his knowledge. A salutary precept has been stated in this form:

"Equity may relieve a party from a judgment taken against him through his excusable neglect." 34 C. J. 464, sec. 730.

This is a rule of equity in Nebraska. *Klabunde v. Byron Reed Co.*, 69 Neb. 126; *Arnout v. Chadwick*, 74 Neb. 620; *State v. Omaha Country Club*, 78 Neb. 178; *Johnson v. Samuelson*, 82 Neb. 201. Under all the circumstances, as they are presented by the record, it seems clear that the attorney general was convinced the suit would not be taken up in his absence without his knowledge, though a specific agreement to that effect had not been closed.

Counsel for plaintiff argued on appeal that it is lawful in Nebraska to bet on horse races and reminded the reviewing court that it is a serious matter to interfere with legitimate methods of raising and disbursing money to meet lawful obligations created by contract. It may be added that it is another serious matter to grant a perpetual injunction to prevent the attorney general of the state from enforcing the laws against gambling and lotteries—laws affecting the morals and pecuniary interests of the public as well as of the plaintiff in equity. When both of those propositions are, in good faith, involved in the same equitable controversy, it is important for the chancellor to discover the real meaning of the law and also the particular facts that control the issues. In granting the perpetual injunction Judge Fitzgerald heard one side only.

In rendering a final decree on an application for a perpetual injunction in a momentous cause affecting both public and private interests, the conscience of a chancellor will generally be better prepared to respond wisely to the promptings of equity and justice after listening attentively to forensic expositions of the law and to deliberate discussions of proved or conceded facts from the standpoint of each side of the controversy.

In the present instance the door to a defense was erroneously closed against defendants. The conclusion is unanimous that they were entitled to an order setting aside the default and the perpetual injunction on the ground of ex-

cusable neglect. The failure to set aside the default and the resulting decree was a manifest abuse of discretion for which the judgment below must be reversed.

It was further insisted by defendants that the default and the perpetual injunction should have been set aside because the petition of plaintiff did not state facts sufficient to constitute a cause of action; because the summons served in Lancaster county was void, leaving the district court without jurisdiction over the attorney general; because defendant Beal was a nominal defendant who never made any of the threats pleaded in the petition; because Judge Fitzgerald, contrary to the rules of the district court, took the cause away from Judge Dineen, to whom it had been regularly assigned for trial. Discussion of these additional grounds is unnecessary for the reason that the default and the decree granting the perpetual injunction must be set aside on the ground already considered.

The default and the decree granting the perpetual injunction are reversed and the cause will be retained in the supreme court to await the final judgment in *State v. Ak-Sar-Ben Exposition Co.*, 118 Neb. 851; the two cases having been consolidated by a former order.

REVERSED.

CARL C. PETERSON, APPELLEE, V. AUGUST MILLNITZ, APPELLANT.

FILED FEBRUARY 7, 1930. No. 27008.

1. **Negligence**: COMPARATIVE NEGLIGENCE. Where it is disclosed in an action for personal injuries that the plaintiff was guilty of contributory negligence, he cannot recover unless his negligence is shown to be slight in comparison with that of the defendant.
2. ———: AUTOMOBILES: STREET INTERSECTIONS: DUTY OF PEDESTRIANS. A pedestrian, attempting to cross diagonally an intersection of public streets where motor vehicles may be expected to approach from four different directions at the same time, is required to look in every direction.

APPEAL from the district court for Pierce county: DE WITT C. CHASE, JUDGE. *Reversed.*

Brown, Fitch & West and *G. F. Nye,* for appellant.

George M. Harrington and *M. F. Harrington, contra.*

Heard before GOSS, C. J., ROSE, DEAN, GOOD, EBERLY and DAY, JJ., and DINEEN, District Judge.

DEAN, J.

Carl C. Peterson, plaintiff, sued in the district court for Pierce county to recover damages for personal injuries sustained when he was struck by an automobile which he alleges was negligently driven by August Millnitz, defendant, July 20, 1927. The jury returned a verdict for $3,750 for plaintiff, upon which a judgment was rendered. Defendant has appealed.

Plaintiff was a man of middle-age at the time. He testified that at or about noon of the day in question here, he was walking toward his home in Plainview, accompanied by Howard Shacklett, a Burlington section foreman. It appears from plaintiff's evidence that he and Shacklett were walking north and that when they reached the street intersection Shacklett continued to walk to the north, but that the plaintiff started to walk across the street in a diagonal direction, and that he looked up just as he started to go across and saw defendant's automobile approaching. On the cross-examination, the plaintiff testified in respect of the accident: "Q. It (the car) was coming toward you and zigzagging and you started to walk diagonally northwest and never thought of it from that time on. Is that right? A. Yes. Q. You did not see this car that went north? A. No. Q. You did not hear the horn blow, did you? A. No. Q. And you were well out in the intersection when you were hit, were you not? A. About five or six steps out, so far as I know. Q. Well, you heard Mr. Shacklett testify here that, when he left, you turned and went due west and then started to cut the corner? A. Yes; but I don't think I did. Q. You say that you started to go kitty-

cornered immediately? A. Yes, sir. Q. You did not go west and then start? A. No. * * * Q. There was nothing about the speed of the car as it came toward you that attracted your attention, was there? A. No, sir. * * * Q. Where was his (defendant's) car when you first saw it with reference to that north and south street a block east? A. About over in the other street. Q. That is a block east? A. Yes."

From plaintiff's evidence it appears that the collision threw him under the car and that he was dragged about half the width of the street intersection and for a time he was rendered unconscious. He was removed to a hospital where he remained five or six weeks and afterward he got about on crutches.

Defendant testified that when the accident happened he was driving a Ford coupé at the rate of 10 or 12 miles an hour, and that he saw plaintiff near the center of the intersection and Shacklett on the sidewalk at the time. Defendant was driving west on the north side of the street until he approached the intersection. According to his evidence, in order to avoid a collision with a car approaching from the west, which turned north at the intersection, defendant was compelled to turn toward the south side of the street. He testified that no signal was given by the driver of the other car as to which direction he intended to turn. Defendant testified that he honked his automobile horn when he was fifty feet from the point of the accident and that plaintiff then turned toward the south and jumped backward and was struck by his car. Due to a recent rain, the record shows that the road was soft and muddy, and the impression of plaintiff's body which was dragged a considerable distance by defendant's car was plainly to be seen in the road. It may be noted that the condition of the road would have something to do with the required time for stopping the car.

From plaintiff's evidence it appears that he saw the defendant's car while it was yet a block away. At the time he was struck plaintiff was not on a crosswalk but was in

the intersection a short distance therefrom. And the evidence also discloses that, but for the approach of another car from the west, which suddenly turned to the north, defendant would have continued driving toward the west and would not suddenly have turned south to avoid a collision with the north-bound car. From the facts before us it appears that defendant was justified in making this turn. Plaintiff, however, was himself guilty of negligence in that he did not look both east and west to find out whether an automobile or other vehicle was approaching before he began walking diagonally out into the street. Plaintiff should have exercised even greater care and caution in crossing in this manner than in crossing at a pedestrian's crosswalk thereon.

The rule appears to be well settled in respect of actions for personal injuries in that, if the plaintiff is guilty of contributory negligence, he cannot recover damages unless his negligence is shown to be slight in comparison with that of the defendant. But where plaintiff's negligence is gross in comparison with the negligence of the defendant, such negligence will defeat a recovery. *Morrison v. Scotts Bluff County*, 104 Neb. 254; *Haffke v. Missouri P. R. Corporation*, 110 Neb. 125; *Allen v. Omaha & S. I. R. Co.*, 115 Neb. 221.

In one of the instructions the court informed the jury that the undisputed evidence disclosed that when the plaintiff was struck by defendant's car he, the defendant, was running his car on the south half of the street and some distance from the sidewalk, and that under such condition it was the duty of the plaintiff to be on the lookout for automobiles from the west, "but it was not his duty as a matter of law to be looking for an automobile coming from the east. He had the right to assume that automobiles coming from the east would be traveling on the north half of the street and not the south half." The foregoing instruction does not appear to us to be a correct statement of the law. In this day of high-powered automobiles, which traverse every village and every city street, a pedestrian cannot be said to be justified in failing to look in all directions for the

approach of automobiles before attempting to cross a street. And in this connection we think the court erred in giving the instruction of which complaint is made by the defendant.

In view of the facts and the law applicable thereto, we conclude that the judgment herein must be and it hereby is

REVERSED.

Note (2)—See 9 A. L. R. 1248; 44 A. L. R. 1299; 3 L. R. A. n. s. 345; 20 L. R. A. n. s. 232; 38 L. R. A. n. s. 488; 42 L. R. A. n. s. 702; 2 R. C L. 1186.

PORTER D. ASKEW ET AL., APPELLEES, V. C. R. SEXSON ET AL., APPELLEES: OSCAR H. HAHN, APPELLANT.

FILED FEBRUARY 7, 1930. No. 27017.

APPEAL from the district court for Adams county: LEWIS H. BLACKLEDGE, JUDGE. *Reversed.*

Stiner & Boslaugh, Edmund Nuss and *Walter M. Crow,* for appellant.

James E. Addie, Bernard McNeny and *O. E. Bozarth, contra.*

Heard before GOSS, C. J., ROSE, GOOD, THOMPSON, EBERLY and DAY, JJ., and LANDIS, District Judge.

GOOD, J.

This is a proceeding to revive a dormant judgment. The pleadings, the evidence and the order of revivor entered are in all respects similar to those disclosed in *Orchard & Wilhelm Co. v. Sexson,* p. 370, *post,* save that the order of revivor was against but two defendants and for an aliquot part of the judgment as to each of the two.

For the reasons given in *Orchard & Wilhelm Co. v. Sexson, supra,* the judgment of the district court is reversed and the cause remanded, with directions to enter an order reviving the judgment in its entirety, as it existed at the time of the assignment thereof to the applicant Hahn.

REVERSED.

ORCHARD & WILHELM COMPANY ET AL., APPELLEES, V. C. R. SEXSON ET AL., APPELLEES: OSCAR H. HAHN, APPELLANT.

FILED FEBRUARY 7, 1930. NO. 27018.

1. **Judgment:** REVIVOR. Section 8982, Comp. St. 1922, authorizes a proceeding to revive a dormant judgment to be instituted at any time within ten years after dormancy occurs.
2. ———: CONTRIBUTION. Where a judgment is rendered against two or more defendants and wherein it is adjudicated that, as between or among them, each defendant is primarily liable for an aliquot part of the judgment, and, as to the remainder, is a surety for the other defendants, any one of such defendants may pay to the judgment creditor the amount of the judgment and take an assignment thereof for the purpose of enforcing his adjudicated rights as against his codefendants. Under such circumstances, the payment of the judgment by one of the defendants does not operate to extinguish the judgment except in so far as the judgment creditor's rights are concerned.
3. ———: REVIVOR. Where, after assignment of a judgment, no part thereof has been paid, and the assignee is entitled to a revival thereof, it should be revived in its entirety as it existed at the time of the assignment.

APPEAL from the district court for Adams county: LEWIS H. BLACKLEDGE, JUDGE. *Reversed.*

Stiner & Boslaugh, Edmund Nuss and *Walter M. Crow*, for appellant.

James E. Addie, Bernard McNeny and *O. E. Bozarth, contra.*

Heard before GOSS, C. J., ROSE, GOOD, THOMPSON, EBERLY and DAY, JJ., and LANDIS, District Judge.

GOOD, J.

This is a proceeding to revive a dormant judgment rendered against eight defendants. The proceeding was instituted by one of the judgment debtors who, before dormancy of the judgment, had paid the amount thereof to the judgment creditor and taken from the latter an assignment of the judgment. In this proceeding one of the judgment debtors had died and another was not served, so that the

proceeding was as against five of the judgment debtors. Of the five, one made default and four filed answers, alleging, as defenses, the statute of limitations, satisfaction of the judgment, and that payment by Hahn, the applicant for revivor, was a discharge of the judgment. A trial of the issues resulted in a judgment of revivor as to three of the defendants, each being held liable for one-fifth of the judgment. The applicant for revivor has appealed.

The original judgment was based upon a promissory note, executed by nine individuals, and represented money borrowed by them to be used in a common enterprise. It was agreed among the makers of the note that each should pay one-ninth thereof, and prior to the beginning of the suit on the note four of the makers had each paid his one-ninth part thereof. In the action upon the note all of the makers were named defendants. For some reason not appearing in the present record, judgment was rendered in favor of the holder of the note against only eight of the makers.

In the original judgment, among others, are the following findings: "That the signers of the note set out and described in the petition herein, and who are the defendants in this case, contracted and agreed *inter alia* that each should pay an equal aliquot part of said note and the indebtedness represented thereby, and that said agreement, contract and obligation of the parties should be recognized and enforced as between them, and that the defendants O. H. Hahn, A. J. Boren, F. B. Muffley and C. R. Sexson have each made such payments. That plaintiff is entitled to recover of and from each and all of the defendants herein said total amount found due the plaintiff as aforesaid, and the costs of this action, and the defendant or defendants paying and satisfying the judgment made, rendered and entered herein should and may have contribution between themselves and from the other defendants," etc. The judgment on the findings contains the following: "That the defendant or defendants paying said amount should and may have contribution from the other defendants or defendant, and that there should be contribution herein be-

tween the defendants in the event that any defendant pays more than his one-ninth part of said indebtedness."

After the judgment was rendered, execution was issued and was levied upon the lands of defendant Hahn. To prevent his property from being sold, he paid the amount of the judgment and took an assignment from the judgment creditor. This was done in December, 1922. Hahn apparently took no steps to enforce contribution under the judgment and permitted the judgment to become dormant; hence, the institution of this proceeding by him. It is apparent that, as agreed among the defendants, each was a principal to the extent of one-ninth part of the note, and surety for the other defendants as to the remaining eight-ninths thereof.

With reference to the defense, urged against revivor, that the judgment had been satisfied by a settlement and arrangement between Hahn and the other defendants, the evidence was somewhat conflicting, and the trial court found against the defense. An examination of the record convinces us that the finding is fully sustained by sufficient evidence and should not be disturbed.

With reference to the statute of limitations, section 8982, Comp. St. 1922, provides: "If a judgment become dormant, it may be revived in the same manner as is prescribed for reviving actions before judgment: Provided, no judgment shall be revived unless action to revive the same be commenced within ten years after such judgment became dormant." Prior to the enactment of this statute there was no limitation as to the time in which a judgment might be revived. Clearly, the statute gives a period of ten years after it becomes dormant in which to revive a judgment. The revivor proceeding here was begun within a few months after dormancy occurred and was not barred by the statute of limitations.

We next come to a consideration of the principal question raised, and that is whether or not, where two or more persons are liable, jointly upon a judgment, but where, as between or among the judgment debtors, each is a principal

for an aliquot part of the judgment and as to the other part is a surety for the other judgment debtors, one may pay the judgment and take an assignment thereof and keep the judgment alive so as to enforce contribution from his codefendants.

It has long been a rule that where a judgment was rendered against two or more defendants, who were jointly liable, a payment of the judgment by one of the debtors satisfied and extinguished the judgment, and if a right to contribution existed it could be enforced only in an independent action brought for that purpose. This rule is not applicable where the judgment pronounced, pursuant to statutory authority, determines the rights of the defendants *inter se* as to subrogation and contribution, in the event one of them is compelled to pay more than his proportionate part of the judgment. In the latter case, payment of the judgment to plaintiff, or his assignee, by one of the defendants operates to extinguish the judgment only in so far as it pertains to the rights of the judgment plaintiff. It does not operate to extinguish or satisfy the judgment in so far as it pertains to the adjudicated rights of defendants *inter se*. In fact, such a judgment is two-fold in character. It determines and adjudicates the rights between the plaintiff, on the one hand, and all the defendants, on the other. It also determines and adjudicates the rights of the several defendants as against each other. In such case, payment to the plaintiff by one of the defendants operates to extinguish the rights of plaintiff only. The judgment remains alive as a basis for the adjustment of the adjudicated rights of the defendants *inter se*. *Drexel v. Pusey*, 57 Neb. 30; *Nelson v. Webster*, 72 Neb. 332, 68 L. R. A. 513; *Danker v. Jacobs*, 79 Neb. 435; *Kramer v. Bankers Surety Co.*, 90 Neb. 301; Comp. St. 1922, sec. 8936; 32 Cyc. 34.

It follows that defendant Hahn, who had paid the judgment and taken an assignment thereof, was entitled to have it revived in its entirety, as it existed at the time he took the assignment. The trial court, in ordering a revival of part of the judgment as to certain of the defendants, did not

accord him the full relief to which he was entitled. It may be remarked that in this proceeding the extent to which Hahn may enforce his rights against his codefendants is not involved and is not here decided.

The judgment of the district court is reversed, and the cause remanded, with directions to enter an order reviving the judgment in its entirety, as it existed at the time of its assignment to Hahn.

REVERSED.

STATE, EX REL. JAMES V. CHARVAT, APPELLEE, V. ANTON SAGL ET AL., APPELLANTS.

FILED FEBRUARY 14, 1930. No. 27144.

1. **Mandamus.** "A mandamus proceeding in Nebraska is an action at law." *State v. Farrington*, 86 Neb. 653.
2. **Corporations: INSPECTION OF BOOKS: RIGHT OF STOCKHOLDER.** At common law a stockholder has the right to inspect the books of a corporation at reasonable times and for proper purposes. The Nebraska statutes are silent on that subject. Therefore, the common-law rule is in effect here and a stockholder has a right to inspect the books of a state bank at reasonable times and for proper purposes.
3. **Mandamus** is the proper form of remedy to enforce the right of a stockholder in a state bank to inspect the books and records of the corporation.
4. **Costs: ATTORNEYS' FEES.** "It is the practice in this state to allow the recovery of attorneys' fees only in such cases as are provided for by law, or where the uniform course of procedure has been to allow such recovery. As a general rule of practice in this state, attorneys' fees are allowed to the successful party in litigation only where such allowance is provided by statute." *Higgins v. Case Threshing Machine Co.*, 95 Neb. 3.

APPEAL from the district court for Lancaster county: ELWOOD B. CHAPPELL, JUDGE. *Affirmed as modified.*

Richard O. Johnson and *Charles E. Matson*, for appellants.

George I. Craven, contra.

Heard before GOSS, C. J., ROSE, GOOD, THOMPSON, EBERLY and DAY, JJ., and LANDIS, District Judge.

GOSS, C. J.

Respondents appeal from a final order, made May 11, 1929, allowing a peremptory writ of mandamus in favor of James V. Charvat, the relator. This writ commands the respondents to allow relator, "accompanied by an attorney and an accountant, or either or both," to examine all books and records of the bank since May 7, 1923, in any way relating to certain specified matters.

Relator's connection with the Farmers & Mechanics Bank of Havelock began in 1922. He was its president until the spring of 1926, when another Havelock bank was consolidated with it. He then became vice-president and director of the bank but ceased to be an active executive and moved to Milligan, Nebraska. About the middle of April, 1928, the bank became impaired and was closed until about May 1, 1928, and reorganized. Relator had owned about three-fifths of its 250 shares of stock. By the reorganization plan all of the shares were canceled and fresh money to the amount of $50,000 was paid in, partly by the former stockholders and partly by new ones, each furnishing two dollars for one of the par value. Relator paid in $1,000 and thereafter and at the time of trial owned five shares but ceased to be an officer. Incidentally, we were told by counsel on the oral argument that the bank was again taken over by the banking department late in June, 1929, and is now under the control of a receiver.

While relator was an officer of the bank, certain real properties were taken by the bank from time to time as security. Some of the titles, at least, were taken in relator's name and the property dealt with as to third parties as if it were his, but most, if not all, of the accounts kept on the bank records; so that, particularly as between the bank and himself, he was concerned as to the status of such accounts and in the securing and preservation of evidence to show that he was not acting for himself but as trustee for the bank in connection with these items. At the time of

the trial some, but not all, of these properties were in litigation.

It seems from the evidence that the bank gave him permission personally to examine the records and accounts of the bank, but when, on November 17, 1928, he orally requested to examine them with the aid of his attorney, and when, on November 23, 1929, a very complete written demand, shown in the evidence, was made on the bank to allow an examination, not only as to the specified trust items, heretofore referred to, but also "to ascertain and determine the true condition of the affairs of said Farmers & Mechanics Bank, Havelock, Nebraska, a corporation, and of the management of its business, the value and nature of said stockholder's interest thereon, and the manner, skill and fidelity with which his interests as a stockholder are and have been guarded and protected," the demands, in the terms in which they were put, were refused. The officers of the bank felt that, in the current nervous state of the customers of banks, an examination participated in by others than the relator might embarrass the bank. This suit followed upon its refusal and was tried on the pleadings supported by evidence.

"A mandamus proceeding in Nebraska is an action at law." *State v. Farrington*, 86 Neb. 653; *State v. Porter*, 90 Neb. 233; *State v. Farmers Irrigation District*, 116 Neb. 373. So a defeated party, in a mandamus proceeding, must file a motion for a new trial in the trial court in order to review facts upon which he was refused relief. Respondents duly filed their motion for new trial in the district court and it was overruled. The judgment of the district court from which respondents appealed carefully limited the right of inspection of the bank's records by relator, accompanied by an attorney and accountant, to those records having to do with the so-called trust matters. It specified the particular properties so involved. Indeed, it provided that any other information so obtained "which has no relation to said property and said causes of action shall not be disclosed to any person or persons whatsoever for any

purpose." The record shows no exception taken by the relator to this order by motion for a new trial or otherwise and shows no cross-appeal by him. So, while much of the briefs and oral arguments were devoted to the legal right of relator as a stockholder to an inspection of the records of the bank to ascertain the condition of the bank and the manner, generally, with which its officers have discharged their duties, we cannot give the relator any relief as to that part of the judgment which excluded him from an examination of the records of the bank generally. We shall consider that phase of the law only as to its effect on the relief the trial court actually granted him.

In some states the statutes provide specifically for inspection of the records of a corporation by a stockholder. Our statutes are silent on that subject.

At common law a stockholder has the right to inspect the books of a corporation at reasonable times and for proper purposes. Cook, Stock and Stockholders (3d ed.) sec. 511; 6 Thompson, Corporations (3d ed.) sec. 4525; cases in notes in 45 L. R. A. 446, and 20 L. R. A. n. s. 185; *Varney v. Baker*, 194 Mass. 239; *Klotz v. Pan-American Match Co.*, 221 Mass. 38; *Guthrie v. Harkness*, 199 U. S. 148; *Woodworth v. Old Second Nat. Bank*, 154 Mich. 459.

In *Guthrie v. Harkness, supra,* the United States supreme court affirmed a judgment of the supreme court of Utah, ordering a national bank to allow a stockholder of the bank to inspect the books, saying: "The possibility of the abuse of a legal right affords no ground for its denial, and while an examination of the books of a corporation should not be granted for speculative or improper purposes, it should not be denied when asked for legitimate purposes;" and "There can be no question that the decisive weight of American authority recognizes the common-law right of the shareholder, for proper purposes and under reasonable regulations as to time and place, to inspect the books of the corporation of which he is a member;" and, again, "The right of inspection rests upon the proposition that those in charge in the corporation are merely the agents of the stockholders who are the real owners of the property."

We are of the opinion that the common-law rule that a stockholder has the right to inspect the books of a state bank at reasonable times and for proper purposes is in effect here.

It is suggested that, because the trial court refused to allow relator to inspect all the books of the bank and limited the inspection to those involved or to be involved in questions arising out of his relations with trust properties where the interests of the bank and of third parties were concerned, the trial court erred. Under the common-law rule he might, under certain circumstances, have been entitled to see all the books. We are not deciding that point here. But it would seem reasonable to say that, if he were entitled to all that was in fact allowed him, he ought not to be penalized for asking more than the district court found he was entitled to. The late Judge Deemer stated this to be the rule, and we adopt it: "The fact that a stockholder, in demanding permission to inspect the books of the corporation, asked for some that he was not entitled to see, does not justify a refusal to permit him to see any of the books." *Ellsworth v. Dorwart*, 95 Ia. 108.

It is also argued that the trial court erred in ordering that relator's attorney and accountant might aid him. On that point the case last cited announced: "A stockholder is entitled to have his attorney and stenographer accompany him and aid him when he decides to examine the books of a corporation." Assuming the good faith and conduct of the relator and of his attorney, as found by the district court, and that the examination would so proceed as not to interfere with the business of the bank, we think the order of the court was proper in that respect.

One of the chief points stressed by the bank is that mandamus is not the proper remedy. Under section 9224, Comp. St. 1922, the writ may issue to any "corporation, board or person, to compel the performance of any act which the law specially enjoins as a duty resulting from an office, trust or station." Long ago the law progressed past the point where the writ was exercised only against

those engaged in governmental affairs. It is necessary to refer only, among a multitude of cases that might be cited, to those cases, heretofore quoted, where mandamus was the form involved. Section 9225, Comp. St. 1922, provides: "This writ may not be issued in any case where there is a plain and adequate remedy in the ordinary course of the law." It is argued that the relator had an adequate remedy at law in his power to take the depositions of those in charge of the records of the bank and in the power granted under section 8901, Comp. St. 1922, and following sections, relating to the inspection and copy of books and papers. But these remedies are of value only in a pending case and between the parties thereto. Even there their practical adequacy is often demonstrably ineffective. For the purposes of discovering the true status of the accounts of the bank and of enabling the relator to allege or to prove them with certainty, the method by deposition or by section 8901 is inadequate. The remedy afforded by a bill of discovery is no longer in use in this state. The statutory procedure for the perpetuation of testimony would not avail in the circumstances involved here. There was no plain and adequate remedy at law, as contemplated in the statute, so as to prevent relator from resorting to mandamus.

Respondents cite *Cincinnati Volksblatt Co. v. Hoffmeister*, 62 Ohio St. 189, as authority that mandamus is not the proper remedy here but that injunction should have been used, as it was there. The Ohio mandamus statute is like ours; but the court held: "Injunction is the proper form of remedy to enforce the right of a stockholder in a private corporation, given by section 3254, Revised Statutes, to inspect the books and records of the corporation." The court thereupon affirmed a judgment enjoining the publishing company from preventing its stockholders from inspecting its books. We have no such statute as that of Ohio, expressly granting such inspection. It might be noted that the court in that case held further that "as incident to such right is the right to have such inspection by a proper agent, and to take copies from such books and records,"

although such right was not expressly set forth in the statute.

On the trial, under the authority of section 9233, Comp. St. 1922, the court took evidence as to damages and the peremptory writ contained a judgment for relator against respondents for $1,040 damages, "$1,000 of which is allowed as a reasonable attorney's fee for plaintiff's attorney, and $40 of which is other damages which plaintiff has sustained." There is evidence to justify both of these amounts; but the item for the damages on account of the fee for the attorney is challenged by the respondents on the ground that the law does not permit it to be considered as an element of damages.

It has been repeatedly held in this court that, since the attorney fee law was repealed by an act in effect as of June 1, 1879, a provision in a note for such a fee is invalid. *Security Company v. Eyer*, 36 Neb. 507, and cases there cited. In tort actions, except where specifically provided by statute, attorney's fees are not recoverable. *Winkler v. Roeder*, 23 Neb. 706. In *Higgins v. Case Threshing Machine Co.*, 95 Neb. 3, Reese, C. J., said for the court: "It is the practice in this state to allow the recovery of attorneys' fees only in such cases as are provided for by law, or where the uniform course of procedure has been to allow such recovery. As a general rule of practice in this state, attorneys' fees are allowed to the successful party in litigation only where such allowance is provided by statute." Relator has cited no statute or decision of this court, nor do we know of any, authorizing the allowance of the fee in the instant case. In that respect the judgment of the district court is erroneous.

For the reasons stated, the judgment of the district court is modified to the extent of eliminating the attorney fee of $1,000 allowed the relator therein, and as thus modified the judgment is affirmed.

AFFIRMED AS MODIFIED.

ELLEN MARIE ANDERSON ET AL., APPELLANTS, V. HELEN ANDERSON ET AL., APPELLEES.

FILED FEBRUARY 14, 1930. No. 26989.

Wills: DEVISE: CONSTRUCTION. The words "I give and bequeath to my beloved wife Helen Anderson all my property of which I may be possessed real and personal after my death as long as she shall remain widow, if she should marry my property is to go to my children share and share alike except as to her dower of which I have no control," under the circumstances of this case, vest in the devisee a determinable fee and not a conditional life estate.

APPEAL from the district court for Douglas county: CHARLES LESLIE, JUDGE. *Affirmed.*

Frank S. Howell, O'Brien & Powers, Perry, Van Pelt & Marti and *Richard S. Horton,* for appellants.

Carl E. Herring, contra.

Heard before GOSS, C. J., ROSE, DEAN, GOOD, EBERLY and DAY, JJ., and DINEEN, District Judge.

EBERLY, J.

The controlling question in this case is whether a life estate or a determinable fee is created by the following language employed in the last will of Gustave Anderson: "I give and bequeath to my beloved wife Helen Anderson all my property of which I may be possessed real and personal after my death as long as she shall remain widow, if she should marry my property is to go to my children share and share alike except as to her dower of which I have no control."

Gustave Anderson died October 2, 1911, leaving him surviving his wife, the devisee named above, and two sons, William G. Anderson and George O. Anderson. On December 22, 1924, the son William G. Anderson died intestate, without issue, leaving his widow, Ellen Marie Anderson, who is plaintiff herein, and his mother, Helen Anderson. The city of Omaha in widening Twentieth street appropriated a portion of the land thus devised, and thereupon

the plaintiff brought an action enjoining the city of Omaha from paying the proceeds of the condemnation proceedings to the widow, Helen Anderson, as the sole owner, contending that the widow's estate under the terms of the will already quoted was limited to a life estate only, and that the fee title at the death of Gustave Anderson vested in the children, William G. Anderson and George O. Anderson, subject to the widow's life estate. After the commencement of this action Helen Anderson died testate, without having remarried. The district court, so far as the controlling question presented here is concerned, found in favor of the widow, adjudging that she took a determinable fee. The reasoning of the district court in support of this conclusion is as follows:

"The essential question in this case is whether Helen Anderson took a conditional life estate as plaintiffs assert, or a determinable fee in her husband's real estate by the following terms in the latter's will: (Already set forth herein.) Nebraska law (Comp. St. 1922, secs. 5590, 5591) provides that no technical words of inheritance shall be necessary to create an estate in fee simple, and every conveyance of real estate shall pass all the grantor's interest, unless a contrary intent can be reasonably inferred from the terms used. The words of the will would carry a conditional fee estate. To limit the devisee's interest to a life estate, under the construction called for by the above mentioned statute, would require either an express devise for life only or that the limitation over apply in terms in 'devisee's death' as well as on her marriage. Neither appears in the will unless it could be found in the words 'as long as she shall remain widow.' In view of the limitation over it cannot be said that the testator meant that in any event these words should limit her to a life estate. The court finds that testator intended a conditional fee should pass to the wife, subject to be defeated if she should marry."

It is to be noted that the trial judge in arriving at the conclusion stated follows the course of reasoning pursued by Chief Justice Maxwell in *Little v. Giles*, 25 Neb. 313. In

the case last referred to, the will, among other provisions, contained the following: "To my beloved wife, Editha J. Dawson, I give and bequeath all my estate, real and personal, of which I may die seised, the same to remain hers * * * so long as she shall remain my widow." It is also to be noted that this will by its terms vested full powers of disposition and conveyance in the widow, so the question here controlling was necessarily coupled with that fact in the case now under consideration. In discussing the effect of the language "so long as she shall remain my widow" Chief Justice Maxwell stated:

"At common law, in order to devise lands to another in fee, it was necessary to use words of inheritance, or equivalent words, showing an intention to give such estate; and a mere devise of real estate without words of inheritance gave the devisee only a life estate.

" 'The proper and technical mode of limiting an estate in fee simple is to give the property to the devisee and his heirs, or to him, his heirs and assigns forever; but such an estate may, even under a will made before 1838, be created by any expressions, however informal, which denote the intention.' 3 Jarman, Wills (5 Am. ed.) p. 30 *et seq.* See *Dew v. Kuehn,* 64 Wis. 293. The presumption at common law is, that only a life estate was intended to be devised, unless words of inheritance or words of like import were used.

"The construction of the will in question by the United States supreme court (*Giles v. Little,* 104 U. S. 291) under the common law, had that controlled the case, therefore, no doubt was correct.

"The common-law rule, however, has been changed in this state in two important particulars: First, 'The term "heirs," or other technical words of inheritance, shall not be necessary to create or convey an estate in fee simple.' Comp. St., ch. 73, sec. 49. And second, 'Every devise of land in any will hereafter made shall be construed to convey all the estate of the devisor therein which he could lawfully devise, unless it shall clearly appear by the will that the

devisor intended to convey a less estate.' Comp. St. ch. 23, sec. 124.

"The first of these sections is not referred to in the opinion of the United States supreme court, and probably the court's attention was not called to it, and the latter section was by mistake, no doubt, copied incorrectly, the word 'clearly' being omitted. *Giles v. Little,* 104 U. S. 291, 299. Mr. Justice Wood, therefore, in writing the opinion, gave no weight to the section whatever."

After a discussion of the decisions relating to the terms of the statute, heretofore quoted, Chief Justice Maxwell then states that the application of these statutory rules rendered necessary the conclusion that "no one will contend that it clearly appears from the above language that the testator did not intend to devise the fee." The point is covered in the syllabus of the case in the following language: "At common law a devise of real estate, in order to convey the fee, must contain words of inheritance or perpetuity, but under the statutes of this state such words are not necessary to convey the fee, and every devise of land is to be construed to convey all of the estate of the devisor therein, unless it shall clearly appear by the will that the devisor intended to convey a less estate." It is to be remembered that in the case of *Giles v. Little,* 104 U. S. 291, the supreme court of the United States had construed the identical will under consideration by this court in *Little v. Giles,* 25 Neb. 313, and announced its conclusion in the following language: "We have no doubt about the true construction of this will. Edith J. Dawson took under it an estate for life in the testator's lands, subject to be divested on her ceasing to be his widow, with power to convey her qualified life estate only. Her estate in the land and that of her grantees determined on her marriage with Pickering."

In point of time the case of *Little v. Giles,* 25 Neb. 313, was followed and approved when the identical will again came before the supreme court of the United States in the case of *Roberts v. Lewis,* 153 U. S. 367, wherein the United States supreme court overruled their former decision in

Giles v. Little, 104 U. S. 291, and announced its conclusion, so far as it related to the nature of the estate vested under the terms of the will in the widow, in the following language:

"By the statutes of Nebraska, 'Every devise of land in any will hereafter made shall be construed to convey all the estate of the devisor therein which he could lawfully devise, unless it shall clearly appear by the will that the devisor intended to convey a less estate;' and 'the term "heirs," or other technical words of inheritance, shall not be necessary to create or convey an estate in fee simple.' Nebraska Comp. St., ch. 23, sec. 124; ch. 73, sec. 49.

"In the opinion delivered by this court in a former case between different parties, and concerning other land, the second of those sections was not referred to, and the first was imperfectly quoted (omitting the word 'clearly' before 'appear') and was treated as of no weight; and it was held, reversing the decision of Judge McCrary in 2 McCrary, 370, that by the true construction of the will the widow 'took under it an estate for life in the testator's lands, subject to be divested on her ceasing to be his widow, with power to convey her qualified life estate only;' and that 'her estate in the land and that of her grantees determined on her marriage with Pickering.' *Giles v. Little,* 104 U. S. 299, 300.

"The supreme court of Nebraska, in a subsequent case (referring to *Little v. Giles,* 25 Neb. 313), considered those sections of the statute as controlling the construction of the will, and making it clear that the widow took an estate in fee."

It cannot be denied that one of the cardinal rules of construction, with respect to the will of Gustave Anderson now before us, is that all parts of the will are to be construed in relation to each other, and, so far as possible, to form one consistent whole. And it is also true that where two modes of construction are possible, as applied to a testamentary instrument, that is to be preferred which will prevent a total or even a partial intestacy. In fact,

this rule of construction is fully embodied in the Nebraska statute, already quoted, and the form of the will here presented also suggests the additional accepted rule of construction that the law favors early vesting of estates and prefers the first to the second taker.

A conclusion which is also fairly consistent with the terms of the Nebraska act quoted, on the subject of the proper construction of the language "as long as she shall remain widow," is discussed in Thompson, Construction of Wills, sec. 382, p. 515:

"The event of contingency which may be provided for the defeat of the qualified or defeasible fee may be the marriage of the first devisee. Thus, a devise in fee simple to testator's wife 'so long as she shall remain my widow' creates a condition subsequent, upon the happening of which the fee simple title is divested. Where a widow is given an estate defeasible by and in the event of her remarriage, her conveyance of the property so devised does not pass a fee to the grantee, but he takes subject to the liability that his estate will be cut down by the subsequent happening of the condition. Death of the widow without having remarried renders the condition ineffective, and the fee passes to her heirs. * * * Where the devise was to the wife of the testator with a provision that she should remain unmarried, but no provision was made for the disposition of the remainder after her death, she took a fee subject to the condition; but where the devise is to the wife 'so long as she remains my widow,' with a limitation over of the remainder 'after the remarriage' and also 'after the death' of the wife, she takes a life estate only."

The reasons above stated are consistent with the Nebraska cases of *Schminke v. Sinclair,* 100 Neb. 101, and *Worley v. Wimberly,* 99 Neb. 20, as it is to be noted in both of these cases there is a defeasance based upon the fact of the death of the devisee in addition to remarriage. This conclusion is also supported by the reasoning which appears in the cases of *Staack v. Detterding,* 182 Ia. 582, and *Jones v. Clyman,* 193 Ia. 1248.

It therefore follows that, under the terms of the Nebraska statutes and in view of the canons of construction applicable, we arrive at the conclusion in the instant case that the estate vested in the wife, under the terms of the will quoted, was a determinable fee, and that, as the devisee never married, the plaintiffs herein have wholly failed to establish a source of title which would vest them with an interest sufficient to maintain their action. The disposition of the case made by the district court is in all things correct and is

AFFIRMED.

GUARANTY FUND COMMISSION, APPELLANT, V. FRED TEICHMEIER ET AL., APPELLEES.

FILED FEBRUARY 14, 1930. No. 26870.

1. **Appeal: JUDGMENT: SUPERSEDAS: LIENS.** The general rule is that the effect of a supersedeas bond is to suspend proceedings, and preserve the *status quo* pending the determination of an appeal. This is true, in an equity case appealed to this court, wherein a reversal and not the supersedeas vacates the judgment. If, however, such a case is affirmed upon appeal, the judgment is a lien upon the lands and tenements of the debtor within the county wherein it was rendered, from the date of its rendition.
2. **Banks and Banking: INSOLVENCY: LIENS.** When the department of trade and commerce takes over a state bank, under the provisions of section 8033, Comp. St. 1922, as amended by section 12, ch. 30, Laws 1925, it impresses the assets of the bank with a statutory first lien for the benefit of the depositors and holders of exchange. Such action by the department of trade and commerce fixes the date of the lien, which is subject to valid existing liens upon the property of the bank.
3. **Appeal: INJUNCTION: FINAL ORDER.** A temporary injunction, continuing during the pleasure or judgment of the court, or until the happening of a future contingency, is not a final order and is therefore not appealable.

APPEAL from the district court for Howard county: EDWIN P. CLEMENTS, JUDGE. *Affirmed.*

H. G. Wellensiek and *Perry, Van Pelt & Marti,* for appellant.

T. T. Bell, contra.

Heard before GOSS, C. J., ROSE, DEAN, GOOD, THOMPSON, EBERLY and DAY, JJ.

DAY, J.

This is an action in equity brought by the guaranty fund commission of the state of Nebraska to restrain the sale of property of the Farmers State Bank of Boelus, Nebraska, under an execution issued on a judgment rendered in favor of the defendant Teichmeier against said bank. From an adverse judgment, plaintiff appeals to this court.

There is no dispute as to the material facts in this case, and the record justifies the findings of fact of the trial judge, which are hereinafter set out in substance, since they so well explain the issues involved in this case. The court found that on October 26, 1926, Fred Teichmeier recovered a money judgment against the Farmers State Bank of Boelus, Nebraska, which was at that time a banking corporation, doing business at Boelus, in the state of Nebraska; thereafter, within the time provided by law, an appeal to the supreme court of the state of Nebraska was duly perfected by said bank and a supersedeas bond given; that thereafter such proceedings were had in said supreme court that said judgment was in all things affirmed, and a mandate was issued to the district court for Howard county, commanding said court to enforce said judgment; that said mandate was entered in the district court on March 26, 1928; that during the pendency of said appeal, to wit, on the 13th day of July, 1927, said Boelus bank was taken over by the department of trade and commerce of the state of Nebraska, and an agent of the state placed in charge thereof, all in accordance with section 7989, Comp. St. 1922; that said agent at all times since said 13th day of July, 1927, has been and is now in possession of said bank and its assets, as agent of the guaranty fund commission of the state of Nebraska; that on April 13, 1928, an execution,

issued out of the district court for Howard county, Nebraska, was placed in the hands of the sheriff of said county, and by him levied upon some real estate, the same being the banking house of said Farmers State Bank, and at the time of the bringing of the suit said sheriff was about to sell said real estate to satisfy said judgment. The court further found that more than a reasonable time had expired from the date the said bank was taken over by the guaranty fund commission to the date of the levy of the execution, to enable the guaranty fund commission to determine whether the bank should be turned back to the bank's officers or closed.

The court further found as a matter of law: "That upon the entry of the judgment against said bank on October 26, 1926, the defendants acquired a lien upon all the real estate of the Farmers State Bank of Boelus, Nebraska, in the county of Howard; that upon the perfecting of an appeal in the supreme court and giving of a supersedeas bond, said lien was suspended, but was not vacated; that, during all the time of the pendency of said cause in said supreme court, the defendants had a subsisting lien upon all of the real estate of said bank in Howard county, Nebraska, and now has such a lien; that any rights acquired in said real estate by any person or corporation, including the creditors of said bank and the department of trade and commerce of the state of Nebraska and its agents in charge during the pendency of said appeal, are subject and inferior to the defendants' said lien; that while said real estate is in the possession of the agent of the department of trade and commerce, under the provisions of said section 7989 of the 1922 Compiled Statutes of Nebraska, the defendants should not be permitted to sell said real estate."

In conformance to the above findings of fact and law, the court decreed that the defendant had a valid lien upon the real estate of the bank, situate in Howard county, Nebraska, superior to the rights of creditors of said bank; "that the temporary injunction heretofore issued herein restraining the sale of the banking house upon execution

to satisfy said judgment be continued until such time as the department of trade and commerce shall turn said bank and its assets over to its officers and directors;" that a permanent injunction is denied. From this decree both parties appeal.

The first question presented in this case is whether a judgment entered in an equity action from which an appeal is taken and a supersedeas bond given, which case under the statutes is to be tried *de novo,* continues as a lien against the judgment debtor's property. The rule is well settled in this state that a judgment rendered against a state bank while in the hands of the guaranty fund commission is not a lien against the real estate of said bank, and execution cannot be issued on said judgment. *Brownell v. Svoboda,* 118 Neb. 76. Therefore, if in this case the judgment does not attach to the land as a lien prior to the taking over of the bank by the guaranty fund commission, it is not superior to the statutory lien created thereby. However, the judgment having been rendered on October 26, 1926, the lien attached to the real estate of the bank prior to the taking over by the guaranty fund commission, unless the filing of a supersedeas bond and an appeal in an equity action vacates said judgment. The plaintiff cites the case of *Riley Bros. Co. v. Melia,* 3 Neb. (Unof.) 666, to support its contention. We are of the opinion that that case does not sustain such a theory. It is said in that case: "The perfecting of an appeal to this court from a decree of the district court in a suit in equity, together with the filing and approval of a supersedeas bond, operates to suspend such decree, and the case is thereupon pending here for trial *de novo.*" In the above case, the judgment had been recovered and upon appeal vacated by reversal of the action by the court, and the question involved was whether or not the decree that was entered by stipulation was in fact the decree of this court.

In so far as the language of *Riley Bros. Co. v. Melia, supra,* seems to hold that the filing of a supersedeas vacates the judgment of the trial court, which is afterwards affirmed

by this court, it is expressly overruled. We are of the opinion, however, that the above case was correctly disposed of and that the disposition was not in conflict with this opinion.

The only other cases cited to support this contention are cases involving an appeal from the county or justice courts to the district court. A trial *de novo* in this court means that the case will be tried upon the same pleadings and evidence upon which it was tried in the district court. There is a distinction between appeals from the county and justice courts to the district court and appeals from the district court to the supreme court. The former are governed by section 9406, Comp. St. 1922, which provides that the parties "shall proceed, in all respects, in the same manner as though the action had been originally instituted in this court." In *Oliver v. Lansing*, 57 Neb. 352, this court said: "When a judgment of the district court is reversed in an appellate proceeding it ceases, from the date of the reversal, to be a lien on the lands of the judgment debtor." And it is further said therein: "A person who purchases real estate burdened with the lien of a judgment will hold it discharged of such lien in case the judgment be afterwards reversed." The general rule is that the effect of a supersedeas bond is to suspend proceedings and preserve the *status quo* pending the determination of the appeal. It suspends all further proceedings on the judgment or decree appealed from, but does not, like a reversal of the judgment by this court, annul the judgment itself. If the case is affirmed, it is a lien, and if the case is reversed, it is not a lien. Under section 8986, Comp. St. 1922, as amended by chapter 59, Laws 1927, this judgment was at least a lien upon the lands and tenements of the bank located in Howard county from the date of its entry.

The second proposition for our consideration is whether or not section 8033, Comp. St. 1922, as amended by section 12, ch. 30, Laws 1925, gives depositors a first lien against the assets of the failed bank at the time of its closing as against the lien of a judgment creditor, which judgment

was secured prior to the taking over of the bank by the guaranty fund commission. This statute, so far as applicable to this case, reads as follows: "The claims of depositors, for deposits, not otherwise secured, and claims of holders of exchange, shall have priority over all other claims, except federal, state, county and municipal taxes, and subject to such taxes, shall at the time of the closing of a bank be a first lien on all the assets of the banking corporation from which they are due and thus under receivership, including the liability of stockholders, and, upon proof thereof, they shall be paid immediately out of the available cash in the hands of the receiver." We are unanimously of the opinion that it is clearly apparent that the legislature intended to give the claims of depositors and holders of exchange priority over all other claims and to fix them as a lien against the assets of the bank. It provides a statutory lien that attaches to the assets of the bank upon the taking over of the bank by the department of trade and commerce and the guaranty fund commission. The lien so acquired dates from the taking over, which in this case was July 13, 1927, and subsequent to the attaching of the judgment lien on October 26, 1926. Under this provision the guaranty fund commission act fixes a lien upon the assets of the bank for the depositors and holders of exchange upon the assets of the bank at the time of such taking over. We have held that the receiver of an insolvent bank takes and holds the assets, as to liens, rights, and liabilities, as they exist at the time of his appointment. *State v. Farmers & Merchants Bank,* 114 Neb. 378. The statutory lien provided for herein, therefore, attaches to the assets of the bank and the assets of the bank are limited to its interest in the property. Its interest in real estate is decreased by the amount of the valid subsisting liens upon the property. A mortgage upon its property given while a going concern limits the bank's interest in the real estate. It could not be said that the guaranty fund commission would take the property free of the lien of such a mortgage. Neither could it be said that a bank, while a going concern, which built a building

to be used as a banking house, could be taken over free of the liens of mechanics and material-men. Nor, if a bank, while a going concern, borrowed money upon a pledge of security, could the guaranty fund commission recover the security free of the lien created by such pledge. Yet all of these things would be true if we followed logically the reasoning of the plaintiff in this case. The department of trade and commerce and the guaranty fund commission took the assets of the Farmers State Bank of Boelus and impressed them with a lien for the benefit of depositors and holders of exchange, subject to and junior to the valid subsisting liens against said assets. The judgment of the defendants was, as the trial court properly held, such a lien.

The question presented to this court by the cross-appeal of plaintiff is whether the trial court should have decreed "that the temporary injunction heretofore issued herein restraining the sale of the banking house upon execution to satisfy said judgment be continued until such time as the department of trade and commerce shall turn said bank and its assets over to its officers and directors." This order was entered by the trial judge, on the theory that, while the real estate was in the possession of the department of trade and commerce and the guaranty fund commission, under the provisions of section 7989, Comp. St. 1922, the defendants should not be allowed to sell the property. It is elementary that in order to entitle one to appeal there must have been a final order or judgment rendered in the cause. This court has without exception held to this rule. Is the above order final? In *Huffman v. Rhodes*, 72 Neb. 57, this court said: "An order is not final when the substantial rights of the parties involved in the action remain undetermined and when the cause is retained for further action. In such a case, the order is interlocutory. When no further action of the court is required to dispose of the cause pending, the order becomes final and from which an appeal or proceedings in error will lie." In *Einspahr v. Smith*, 46 Neb. 138, this court said: "An order continuing in force during the pleasure of the court a temporary injunction theretofore

issued is not final, and is therefore, not appealable." The order complained of in this case is such an order continuing the temporary injunction during the pleasure of the court or upon the happening of a contingency. We cannot determine from the record whether or not this contingency has occurred. For aught the record discloses, this bank may have been returned to its officers or directors. It is an order continuing in force until a future changed condition or during the pleasure of the court, and is therefore not appealable. It leaves matters for further judicial determination of the trial court, and is therefore not a final order from which an appeal may be taken.

We have carefully examined the assignments of error and the record in this case; we find no reversible error, and the judgment of the trial court is therefore in all respects

AFFIRMED.

FIRST NATIONAL BANK OF ALLIANCE, APPELLEE, V. WILLIAM NEWTON, APPELLANT: KEITH L. PIERCE ET AL., APPELLEES.

FILED FEBRUARY 21, 1930. No. 27048.

1. Trial: REQUEST FOR DIRECTED VERDICT. In a civil trial by jury where, at the close of the evidence, both plaintiff and defendant move the court to direct a verdict in their favor, they thereby submit the case to the court upon the issues of law arising upon the facts as the court finds those facts from the evidence.
2. Sales: CONDITIONAL SALE CONTRACT: RECORDING. A vendor or his assignee is not required to file a conditional sale contract in order to render it valid as against the vendee, who is a maker thereof; the purpose of filing the same when required by section 2464, Comp. St. 1922, is to make it valid as against "purchasers in good faith or judgment or attaching creditors without notice."
3. Bills and Notes: NEGOTIABILITY. A promissory note, regular in form, is not rendered nonnegotiable under the negotiable instruments law by the mere fact that, accompanying it and executed on the same sheet of paper by the maker of the note, there was a conditional sale contract, showing that the note was given by the maker to the payee for an automobile purchased by the maker from the payee and that the title, ownership and right of possession should not pass until "the above note" should be fully paid.

4. Venue: SUMMONS TO ANOTHER COUNTY. Where, in a suit brought in one county, a defendant residing and served with summons in another county is not rightly a party thereto because not jointly liable on the cause of action sought to be enforced against others, the service of summons on such a defendant in such other county is not authorized by section 8570, Comp. St. 1922; the quashing of service on such a defendant, on his timely special appearance for that purpose only, is proper.

APPEAL from the district court for Sheridan county: EARL L. MEYER, JUDGE. *Affirmed.*

John E. Gilmore, Allen G. Fisher and *Charles A. Fisher,* for appellant.

Mitchell & Gantz and *Harry R. Ankeny, contra.*

Heard before GOSS, C. J., ROSE, DEAN, GOOD, THOMPSON, EBERLY and DAY, JJ.

GOSS, C. J.

The bank brought suit in Sheridan county against the defendant Newton to replevy two automobiles. Each car was the subject of a separate cause of action. Newton filed an answer and cross-petition making Pierce and Jenkins, who lived and did business in Box Butte county, defendants. The defendants Pierce and Jenkins were served individually in their home county. They appeared specially and moved to quash the service. Their motion was sustained. The case proceeded to trial as between the bank and Newton. At the close of the evidence both parties moved for directed verdicts. The court sustained the motion of defendant as to the first cause and of plaintiff as to the second cause and entered judgment awarding the possession of the automobile to plaintiff. Plaintiff did not appeal. Defendant appealed and therefore we have to consider errors assigned by defendant Newton as to the second cause of action, which involved an Oakland sedan.

The chief errors assigned are that the court erred in quashing service on Pierce and Jenkins and in rendering judgment against Newton on the second cause of action. The latter point goes to the question whether Newton was

entitled to defend the suit of the bank on grounds as between him on the one hand and Pierce and Jenkins on the other. His cross-petition alleged and prayed as against them on account and for damages for a sum far in excess of the value of the car as pleaded by plaintiff.

Keith L. Pierce and George M. Jenkins, a copartnership, of Hemingford, Box Butte county, were what is called in the evidence direct dealers, and William Newton of Hay Springs in Sheridan county was an associate dealer, who obtained his cars through them in 1927. On or about November 10, 1927, he bought the car in question and in the settlement gave Pierce and Jenkins his note for $1,079.05. This note was renewed December 15, 1927, by a new note for $1,089.55. The first note had been sold to plaintiff and the renewal was likewise turned over to plaintiff. The note was made out on a printed form furnished by a Lincoln supply house and the form is entitled "Conditional Sale Contract—with Note." Both the note and contract are filled out on the inside of the blank. In evidence, omitting immaterial printing, it is as follows:

"1089.55 December 15th, 1927.

"For value received, I promise to pay to the order of Pierce & Jenkins the sum of ten hundred eighty-nine and 55-100 dollars, with interest at the rate of 10 per cent. per annum from date until paid, payable with exchange, at Citizens National Bank Hemingford, Nebr., in instalments, as follows, to wit: $1089.55 on the 15th day of Jan. 1928.

"Wm. Newton.

"The express condition of the sale and purchase of one Oakland four-door sedan Motor number 193939 Serial number 188234, for which the above note is given is such that the title, ownership and right of possession does not pass from Pierce & Jenkins to the signer hereof until the above note, original or renewed, and the instalments referred to therein and interest thereon, as therein provided, are fully paid; and further, that in event of nonpayment of the note or any of the above debt, original or renewed, or any interest thereon, or any of the instalments therein provided for,

at the time or times when the same shall, by the terms thereof, become due and payable, or of the sale, incumbrance or removal without the written permission of the said Pierce & Jenkins of the said automobile from the present place of business or residence of the signer in Town ——— County Sheridan State Nebraska the said Pierce & Jenkins or the endorser or owner of this instrument is hereby authorized and given full power to declare the note and the debt herein referred to, due and payable at once, even before maturity of the same, and in that case said Pierce & Jenkins or assigns may sell said automobile at public or private sale and retain all payments I have made in lieu of the use thereof, and as charges and damages on the same.

"Wm. Newton."

The paper was indorsed: "Pierce & Jenkins by G. M. Jenkins."

At the close of the evidence both parties moved for directed verdicts. The rule in such event is that, where both plaintiff and defendant in a civil trial by jury move the court to direct a verdict of the jury in their favor, they thereby submit the case to the court upon the issues of law arising upon the facts as the court finds those facts from the evidence. *Segear v. Westcott,* 83 Neb. 515; *Dorsey v. Wellman,* 85 Neb. 262; *Henton v. Sovereign Camp,* W. O. W., 87 Neb. 552; *Davison v. Land,* 89 Neb. 58.

Laying aside the questions of law arising by reason of the sale contract executed and delivered along with the note, there is ample evidence to support the judgment of the trial court that the bank was the holder of the note in due course. It was regular on its face, it was taken in good faith and for full value within a day or two after it was made, and the bank had no notice of any defect or infirmity in the note or defect in the title of Pierce and Jenkins, all as required by section 4663, Comp. St. 1922, which is a part of our uniform negotiable instruments act, effective August 1, 1905 (Laws 1905, ch. 83). The bank likewise at the same time became the owner and holder by delivery and by assignment of the contract which was printed and

was signed by defendant on the same form as the note and which contract referred to "the above note."

It is claimed by defendant that this sale contract was void and could never convey the right of possession to the bank because it was not recorded until after the maturity of the note. The note became due January 15, 1928. The evidence shows that a copy of the note and contract with such an affidavit as is required by section 2464, Comp. St. 1922, was filed for record in the office of the county clerk of Sheridan county, where defendant resided, on February 23, 1928. The defendant then had possession of the car. No rights of purchasers or creditors had intervened. The purpose of the section just cited is to protect "purchasers in good faith or judgment or attaching creditors without notice." There were none such. Only as to them is such a contract invalid if not filed. *McCormick v. Stevenson,* 13 Neb. 70; *Campbell Printing Press & Mfg. Co. v. Dyer,* 46 Neb. 830; *Osborne Co. v. Plano Mfg. Co.,* 51 Neb. 502; *Wilson v. Lewis,* 63 Neb. 617.

There was satisfactory evidence before the trial court that the bank had no notice of any claim on the part of Newton against Pierce and Jenkins that might be asserted as a defense against them, though of course it had notice of whatever was contained in the contract attached. But Newton claims that, as a matter of law, the conditional sale contract put the bank upon notice so as to destroy the negotiability of the note.

It may be noted that we held, in *Peterson v. Kuhn,* 110 Neb. 372: "A promissory note, secured by a real estate mortgage which provides that the mortgagor shall pay the taxes levied against the mortgage or debt secured thereby, is negotiable, notwithstanding the fact that the note and mortgage are parts of a single transaction." This decision was bottomed on certain changes in the statutes relating to mortgages and thus did away with the effect of certain prior decisions cited in the opinion; but the opinion took note of the negotiable instruments law and argued that the conclusion was not affected thereby. The decision

was followed in a similar case. *Lindstrom v. Beacom,* 110 Neb. 607.

This court held in an early opinion written by Judge Cobb that a promissory note, otherwise negotiable, is not rendered nonnegotiable by reason of containing a recital in these words: "The express condition of the sale and purchase of this Ohio reaper and mower No. ——— is such that the title, ownership, or possession does not pass from the said McDonald & Co. until this note and interest is paid in full. That the said McDonald & Co. have full power to declare this note due and take possession of said machine at any time they may deem themselves insecure, even before the maturity of the note." *Heard v. Dubuque County Bank,* 8 Neb. 10. Pound, C., in an opinion cited the foregoing case and said: "A note otherwise negotiable is not rendered nonnegotiable merely by a provision for or reference to collateral security." *Roblee v. Union Stock Yards Nat. Bank,* 69 Neb. 180. These cases have never been overruled. It is true that they arose prior to the adoption of the uniform negotiable instruments act. It is to be said on the other hand, also, that in the case at bar the conditions relating to the security afforded by the contract as to the automobile were not embodied in the note itself but were evidenced by a separately signed contract. No particular section of the law has been pointed out in the argument as contravening the holding in these cases.

A somewhat similar case arose in the state of Washington, although under the first paragraph of what is our section 4614 of the negotiable instruments act, defining what is an unconditional promise. After a note which was negotiable in form, the parties signed the following written agreement on the same paper: "It is herein provided and agreed that the above note is to be paid from the proceeds obtained from the sale of lots in the town of Vanora, * * * and that one-fourth of the proceeds of all sales of the lots * * * are to be applied to the payment of said note and interest until the same is paid." Plaintiff, an indorsee, sued the maker of the note. It appeared that all the lots

had been sold and the proceeds were not sufficient to pay the note in full. Held, that the promise to pay was unconditional and that plaintiff could recover. *Van Tassel v. McGrail*, 93 Wash. 380.

While differing from this case in the fact that the recital was in the note rather than in a separate instrument, one of the best cases we have seen is from Delaware, decided in 1922, to the following effect: "A recital in a note that it was given covering deferred instalments under conditional sales contract for motor vehicle does not render it nonnegotiable under uniform negotiable instruments act (Rev. Code 1915, secs. 2646, 2647, 2649, 2650), and suit may properly be brought in the name of the indorsee thereof." *Continental Guaranty Corporation v. Peoples Bus Line*, 31 Del. 595.

The retention of title and the right of possession in the vendor appeared in the facts in *Heard v. Dubuque County Bank*, 8 Neb. 10, as it does in the instant case. The rule in that respect is stated in 3 R. C. L. 917, as follows: "It seems to be a settled rule that the negotiability of a note is not destroyed merely because, in addition to the promise to pay, it contains a statement that the title to the property for which the note is given is not to pass until the note is paid."

We are of the opinion that the note sued on was negotiable and that, as between the plaintiff and the defendant Newton, any counterclaim or set-off he may have had against Pierce and Jenkins could not, in the circumstances disclosed by the pleadings and evidence, be a proper defense as against the note in the suit of the bank against the defendant.

There being no joint liability of Pierce and Jenkins and of plaintiff to Newton for such accounting and damages as he claimed against Pierce and Jenkins, the court did not commit any prejudicial error in sustaining the motion of Pierce and Jenkins to quash the service secured upon them in Box Butte county. The action was not rightly brought against them and hence there was no statutory right to

obtain jurisdiction over them by serving them with summons in another county than the one in which the suit was brought. Comp. St. 1922, sec. 8570.

Finding no errors in the proceedings and trial, we are of the opinion that the judgment of the district court should be and it is AFFIRMED.

Note—See Bills and Notes, 8 C. J. 129 n. 52; 43 L. R. A. 277; 43 L. R. A. n. s. 945; 28 A. L. R. 699; 3 R. C. L. 917; R. C. L. Perm. Supp. 919.

GUY SPURRIER ET AL., APPELLEES, V. MITCHELL IRRIGATION DISTRICT ET AL., APPELLANTS.

FILED FEBRUARY 21, 1930. No. 27096.

1. Waters: IRRIGATION: LIABILITY FOR SEEPAGE. In this state the owner of an irrigation canal or ditches is not liable to one whose land is injured by seepage from said canal or ditches, not intentionally caused by him, unless he is negligent in the construction or operation of the works. Therefore, the owner of an irrigation canal or ditch is not an insurer against seepage therefrom, but is liable only for negligence and intentional wrongdoing.
2. ———: ———: ———. Since it was not alleged or proved in this case that the seepage of plaintiffs' land was caused by the negligence or the wilful acts of the Mitchell Irrigation District or the Gering and Ft. Laramie Irrigation District, there can be no recovery based upon the seepage from their canals or ditches.
3. ———: IRRIGATION DISTRICTS: COMMON CARRIERS. Irrigation districts were created by legislative enactment to serve a public interest, and section 8477, Comp. St. 1922, designates them as common carriers.
4. ———: ———: FURNISHING WATER. As common carriers, irrigation districts are required to furnish water to those entitled to the same under the appropriation at a reasonable and uniform price, provided, of course, such charges are paid.
5. ———: ———: LIABILITY. Since section 2926, Comp. St. 1922, makes an irrigation district liable for failure to deliver water to a landowner entitled under the water appropriation, said district, having no discretion but to deliver the water, is not liable in damages for injury resulting from the lawful application of said water to the land by the owners thereof.

6. ———: IRRIGATION. Since the artificial application of water is a necessity for agriculture in a large area of our state, irrigation has been recognized and encouraged by the framers of our Constitution, as well as by our legislators.

7. ———: ———: LIABILITY. In localities where irrigation is beneficial or necessary for successful agriculture, the owner of land has a right to use his own land for such appropriate purpose. In such use he may improve his land by the lawful artificial application of water, provided he does it in a reasonable and careful manner. He will not be answerable to an adjoining landowner unless guilty of some negligent or wilful act which is the proximate cause of damage to another, although he may thereby cause water to seep upon the premises of the latter.

8. ———: ———: ———. In such a case, the artificial application of water being necessary in the interest of good husbandry, if the lawful application of water, an incident to the ownership of the land, is applied without negligence and in a proper manner, the subterranean drainage therefrom is a burden the lower land must bear.

9. ———: ———: ———. The owner has the undoubted right to cultivate and plant his land. Having planted it, there can be no question but that he has the right to irrigate to grow and mature his crop. In the reasonable exercise of this right, although damage may be occasioned to another proprietor, he is responsible only for injuries resulting from his negligence or wilfulness.

10. ———: ———: DRAINAGE. Section 2887, Comp. St. 1922, does not absolutely require irrigation districts to drain all nearby land seeped by percolating subterranean water. This section provides for the drainage of lands within the district, and the remedy provided by this section for the drainage of such lands is exclusive.

11. **Eminent Domain**: IRRIGATION DISTRICTS: SEEPAGE. In order to recover damages under section 21, art. 1 of the Constitution, for the taking or damaging of private property for public use, there must be an invasion of a lawful property right. The defendants in this case, in the absence of negligence or wilfulness in their irrigation operations, being entitled to subterranean drainage, have violated no property right.

12. **Waters**: IRRIGATION DISTRICTS: NEGLIGENCE: PROXIMATE CAUSE. The Mitchell Irrigation District by its operation for a long period of years had raised the water table under plaintiffs' land without injury. The Gering and Ft. Laramie District commenced operations and plaintiffs' land seeped, the Mitchell district applying the same amount of water as for years before.

Held, that even if the Mitchell Irrigation District was negligent, recovery could not be had against it because its negligence was not the proximate cause of the injury.

13. ———: ———: ———: QUESTION FOR JURY. Whether or not the failure of an irrigation district to construct drainage ditches to take care of seep and percolating water is negligence or wilfulness depends upon the facts and circumstances of each particular case, and is a question of fact to be determined from the evidence by the jury.

APPEAL from the district court for Scotts Bluff county: EDWARD F. CARTER, JUDGE. *Reversed and dismissed.*

Morrow & Morrow, Wright & Wright and *Mothersead & York*, for appellants.

Raymond & Fitzgerald, contra.

Heard before GOSS, C. J., ROSE, DEAN, GOOD, THOMPSON, EBERLY and DAY, JJ.

DAY, J.

This action was brought to recover damages for injuries to land by seepage from several irrigation districts. In the trial court plaintiffs recovered for temporary damages, that is, for the loss of the use of the land for two certain years.

The plaintiffs' land lies within the Mitchell Irrigation District and has been irrigated under said district since its organization in 1896. The Gering and Ft. Laramie Irrigation District was organized in 1918, for the irrigation of land of higher levels than the plaintiffs' and higher than the land under the Mitchell ditch. Neither ditch crosses the land involved and no compensation has been paid the plaintiffs as a result of the construction of said irrigation works. The land in question was irrigated for years under the Mitchell ditch, without damage from seepage, and it was not until after the Gering and Ft. Laramie ditch was placed in operation that the seepage appeared. The plaintiffs allege in their petition that their land was damaged by the seepage or percolation of the water caused by the operation of the defendants, Mitchell Irrigation Dis-

trict, the Gering Irrigation District, and the Gering and Ft. Laramie Irrigation District. In fine, they contend that the percolating waters contributed by the Gering and Ft. Laramie district and the seepage and percolation of the Mitchell and the Gering district combined to cause the damage. The Gering and Ft. Laramie district and the Mitchell district irrigate lands, the drainage of which percolates through the subsoil of the plaintiffs' land. The Gering district does not irrigate any such land, but about 1900 enlarged the Mitchell Irrigation District canal to a capacity sufficient to carry its requirements for water for the irrigation of lands within its district, which district lies beyond the Mitchell Irrigation District, the subterranean drainage of which does not reach the plaintiffs' land.

The Mitchell Irrigation District, by its answer, admits most of the facts which are alleged by the plaintiffs in their petition, except that it caused the seepage. For a further defense they allege in their answer that there was a misjoinder of parties, in that there was no joint act of the several defendants, but that each was operating a single enterprise and that any damage which may have occurred was not the result of the joint act of the defendants. This defendant also urges by way of defense that the lands under the Mitchell irrigation ditch had been irrigated for many years without any seepage, and that the damage to the plaintiffs' land was caused by the irrigation of lands under the Gering and Ft. Laramie canal. For a further defense, the Mitchell district claims that, having irrigated the lands under its ditch since prior to 1898, which was more than 10 years prior to 1926, openly and notoriously, when it was a matter of knowledge that the irrigation of lands raised the water table, they acquired a right to continue to so operate the canal and distribute water for irrigation of said land, and that the plaintiffs' land would never have been damaged except for the construction and operation of the Gering and Ft. Laramie canal. They insist also that, since their works were constructed in 1896 and have been in continuous operation from that date, the

statute of limitations has run against the plaintiffs. The Gering and Ft. Laramie Irrigation District admits in its answer the organization of the irrigation district, and alleges that it does not own the irrigation works but only acts as the fiscal agent for the United States of America, for the part of the Ft. Laramie division of the North Platte project located within the state of Nebraska, which is the irrigation canal, works and improvements mentioned in the plaintiffs' petition and referred to as the Gering and Ft. Laramie canal. It alleges that it merely operates and maintains the canal laterals and irrigation works constructed by the United States under the direction and control of the secretary of the interior; that in the construction and operation of the works every reasonable precaution and care has been taken to prevent water seepage therefrom, other than by lawful diversion for the irrigation of the lands lawfully entitled to irrigation therefrom; that the seepage on the plaintiffs' land occurred prior to the time this defendant took over the operation and maintenance of the canal and irrigation works; that any damages to, or appropriation of, said land occurred prior to the operation and management of said defendant. Their position is that since they did not construct the works and do not own them, there can be no recovery against them for appropriating or damaging. And inasmuch as they have operated the works in a careful and prudent manner without negligence, there can be no recovery against them on that theory. The answer of this defendant also alleges that any damage occurring to the land or capacity of the plaintiffs by reason of seepage, percolating waters or excessive moisture was caused by the irrigation of lands within the Mitchell Irrigation District above those of plaintiffs, together with the irrigation of the plaintiffs' land by plaintiffs.

To the several answers of the defendants, the plaintiffs reply as follows: That as to the Mitchell Irrigation District, the seepage did not appear until 1925, and their cause of action accrued then, and not at the time of the construction

of the works. With reference to the answer of the Ft. Laramie district, they allege the Ft. Laramie district was organized prior to 1919 for the purpose of acquiring irrigation works or causing the same to be constructed for the improvement of lands within the district, and for said purpose they entered into a contract with the United States of America in 1920; that all the works and canals referred to were built for the benefit of the defendant district, and by reason thereof the district is liable for the acts occasioned by said improvement. This extended summary of the pleadings has been made in order that the issues involved might clearly appear.

The case was submitted to the jury by the court on the theory that the building and operation of the Mitchell district with the Ft. Laramie district, together with the breaking out and cultivation by irrigation of lands thereunder, caused the seepage of plaintiffs' land and resulted in damage or taking thereof under the Constitution of the state of Nebraska. This was done upon the theory that the irrigation districts were liable for seepage caused by the irrigation of lands by the owners thereof within their districts, and that the defendant Gering and Ft. Laramie district was liable for damage and taking, if any, caused by the building of the canal by the United States of America, before control was turned over to it.

At the close of the testimony, upon the motion of the defendant Gering Irrigation District, the trial court withdrew from the consideration of the jury the liability of the Gering Irrigation District. There was no appeal from this order and no question is presented with respect thereto. The only possible basis of liability upon which the Gering district could be held was for the seepage from its canal which ran at some distance from plaintiffs' land. The situation of the Mitchell Irrigation District, in so far as its canal was concerned, was exactly the same as that of the Gering canal, with the exception that the Mitchell Irrigation District had certain laterals running out through the land irrigated, each of which carried relatively smaller

amounts of water than the main canals. The situation of the Gering and Ft. Laramie district, in so far as the operation of its irrigation canal and laterals, is the same as the Mitchell district, except that they are located at a greater distance from the plaintiffs' land. There is no allegation of negligence in this case on account of improper construction of the works, and in the absence of negligence the irrigation district is not liable for seepage from its canals and laterals.

In *Mackay v. Breeze,* 269 Pac. (Utah) 1026, it was said: "The rule of law announced in the leading English case of *Fletcher v. Ryland,* 1 E. R. C. 235, where it is held that the defendant was under an absolute duty to keep water which he had collected in a reservoir from doing injury to others, has not generally been applied to ditches and canals. One who constructs a ditch or canal and conveys irrigation water through the same must use ordinary care in the construction, maintenance, and operation of such ditch or canal. The degree of care required to prevent the escape of water is commensurate with the damage or injury that will probably result if the water does escape. Such is the rule of law repeatedly announced in this jurisdiction and generally established in America and England when applied to ditches and canals." Numerous Utah cases, as well as cases from other jurisdictions, together with other authorities, are cited to support this view, some of which we will mention.

The owner of an irrigation ditch is not an insurer against damage by seepage as a result of the construction and maintenance of said ditch, but is only required to use reasonable skill and care in the building of his works, and the operation thereof. He is only liable for injuries resulting from negligent construction and operation. *Howell v. Big Horn Basin Colonization Co.,* 14 Wyo. 14, 1 L. R. A. n. s. 596. The foregoing view is supported by the great weight of authority. We cite only a few of the many cases from the various states wherein the rule has been applied to irrigation ditches and canals. *Longmire v. Yelm Irrigation District,* 114 Wash. 619; *Nahl v. Alta Irrigation Dis-*

trict, 23 Cal. App. 333; *Fleming v. Lockwood*, 36 Mont. 384, 14 L. R. A. n. s. 628; *Calvert v. Anderson*, 73 Mont. 551; *Jeffers v. Montana Power Co.*, 68 Mont. 114; *Grand River Ditch Co. v. Ruane*, 82 Colo. 333; *Anderson v. Rucker Bros.*, 107 Wash. 595. See, also, 1 Wiel, Water Rights in the Western States (3d ed.) sec. 461, p. 489. While not stating the rule in clear, concise, and controlling language, our court in *Kearney Canal & Water Supply Co. v. Akeyson*, 45 Neb. 635, examined the record to determine whether, in a case for damage resulting from water escaping from an irrigation canal, the verdict was supported by proof of negligence. We may logically infer that the view of the court at that time was such as to require proof of negligence to recover. At a later date this court said in substance that an irrigation district in construction of its drainage ditches incurs no liability in the absence of negligence. While not strictly applicable to the instant case, it is indicative of the tendency of the prevailing view of this court upon the subject.

It therefore follows that in this state the owner of an irrigation ditch or canal is not liable to any one whose land is injured by seepage from said ditch or canal, not intentionally caused by him, unless he is negligent in the construction or operation of the works. The owner of such an irrigating canal or ditch is not an insurer, but is liable for damage caused by seepage caused by his wilful acts, and his negligence in constructing, maintaining, and use of such ditch. In the absence of negligence in this case, neither the Mitchell Irrigation District nor the Gering and Ft. Laramie Irrigation District are liable on account of the seepage caused by the water conducted through their canals or ditches.

The foregoing discussion is illuminative of the general theory of the law applicable to irrigation districts, and the question of their liability relative to the construction, operation and use of their works. It is a matter of common knowledge that thousands of acres of arid or semi-arid land in the western part of this state have either been re-

claimed or improved by means of irrigation. Here, as in the other states wherein irrigation is practiced extensively, the rules of the common law and the statutory law, and the decisions of the courts applicable to waters and water courses have been found inimicable to the public interest, so dependent upon productive agriculture, made possible by the development of irrigation projects. Our Constitution, our statutes and the decisions of our courts all challenge our attention to the desirability as well as the necessity for the modification of these rules. Indeed, so different are the problems and so different are the conditions, that in the western states the rules regulating irrigation have a prevailing tendency toward practicalism.

Irrigation districts are creatures of the statute to serve a public purpose, and were created for specific and certain purposes, namely, to convey water from the place of appropriation at the stream to the owners of the land entitled to the use of said water for irrigation. In its operation, the carrying of water from the point of appropriation at the stream to the place of delivery to the landowner for the benefit of whose land the appropriation was made, the irrigation district is a common carrier. Comp. St. 1922, sec. 8477; *Dundy County Irrigation Co. v. Morris*, 107 Neb. 64. Having undertaken the project, it is required to furnish water to the owners of the land and cannot refuse to so deliver, even if it should appear that in the lawful use of the water by the landowner the percolating waters of subterranean drainage should damage another landowner, such as the plaintiffs in this case. To so refuse would render the irrigation district liable to respond in damages for the failure or refusal to furnish water. Comp. St. 1922, sec. 2926; *Clague v. Tri-State Land Co.*, 84 Neb. 499; *Six v. Bridgeport Irrigation District*, 105 Neb. 254; *Peden v. Platte Valley Farm & Cattle Co.*, 93 Neb. 141; *Meier v. Bridgeport Irrigation District*, 113 Neb. 344. The irrigation district being a common carrier of water from the point of appropriation of the stream to the place of delivery to the owner of the land, required to perform said

service, is not liable by statute for any damages resulting from the lawful application of said water to the land by the owners thereof, or for incidental damage to another caused by seepage.

In recognition of the fact that a large area of semi-arid land has been recovered through irrigation projects, the people of the state, speaking through our Constitution, have said: "The necessity of water for domestic use and for irrigation purposes in the State of Nebraska is hereby declared to be a natural want." Const. art. XV, sec. 4. This was the equivalent of a declaration that water is a natural need, and relying upon this principle our people have secured this natural need through irrigation works, and applying it to the semi-arid lands have made them bud and blossom and bear fruit. Recognizing the necessity of the artificial application of water to land in the interest of good husbandry, this state has recognized and encouraged irrigation by constitutional provision and legislative enactment. We are not unmindful, either, of the well-established rule that an owner of land must so use his own property as not unnecessarily and negligently to injure his neighbor. And we are also cognizant of the rule so well stated by Letton, J., in *Aldritt v. Fleischauer*, 74 Neb. 66: "Every proprietor may improve his property by doing what is reasonably necessary for this purpose, and, unless guilty of some act of negligence in the manner of its execution, will not be answerable to an adjoining proprietor, although he may thereby cause surface water to flow on the premises of the latter to his damage." In this case, the problem presented involved the right to drain surface waters from land that it might be made tillable, and it continued as follows: "An owner of land has the right in the interest of good husbandry to drain ponds or basins thereon of a temporary character, and which have no natural outlet or course of flow, by discharging the waters thereof by means of an artificial channel into a natural surface-water drain on his own property, and through such drain over the land of another proprietor in the general course of drainage in

that locality, even though the flow in such natural drain is thereby increased over the lower estate, and provided that this is done in a reasonable and careful manner and without negligence."

If in the interest of good husbandry, coupled with the right to use the land for an appropriate purpose, it is allowable to drain surface waters, which drainage seems to be a burden imposed upon the lower land, certainly the subterranean drainage is a reasonable burden to impose upon the lower land in localities requiring irrigation in the interests of good husbandry. In localities requiring irrigation in the interest of good husbandry, the lawful application of water is an incident to the ownership of the land. If the owner thereof for such purposes applies the water to his land without negligence, and in a proper manner irrigates his land, the drainage from such lawful, careful, and proper application of water to his land is a burden the lower land must bear. The rule relative to the application of water to land ought not to be more severe than that applicable to the running of water through canals and ditches. The principle herein enunciated was considered in the case of *Gibson v. Puchta,* 33 Cal. 310, wherein it was sought to recover for damages resulting from the irrigation of land which caused water to seep into a mine under said land. It was there said: "The defendant had the undoubted right to cultivate and plant this tract of land; and having planted it, there can be as little question that he had the same right to irrigate it for the purpose of maturing his crop. * * * An action cannot be maintained against him for the reasonable exercise of his right, although an annoyance or injury may thereby be occasioned to the plaintiffs. He is responsible to the plaintiffs only for the injuries caused by his negligence or unskilfulness, or those wilfully inflicted in the exercise of his right of irrigating his land." The defendant's position is possibly no worse than if, unexpectedly, sufficient rain fell on said land to produce the same abundant crops grown by irrigation, and, as a result thereof, the water table under the land should be raised

until his lands seeped. It would be *damnum absque injuria.*

The irrigation district is not absolutely required to drain lands which are seeped by percolating subterranean water caused from the operation of legal irrigation works, except in the manner provided by statute. Section 2887, Comp. St. 1922, provides for the drainage of land within its limits which have been subirrigated by reason of the lawful use of water from its canal by the owner or lessee of the land subirrigated, or from any cause, not at fault or by the consent of such owner or lessees. This section of the statute creates liability *ex contractu* between the owners of land within the irrigation district, but said section does not fix or attempt to fix liability for drainage of percolating or seeped waters from irrigation projects on land without the district. Furthermore, plaintiffs in this case cannot compel the Gering and Ft. Laramie Irrigation District, under the above statute, to drain their lands, inasmuch as they are not within the said irrigation district, and the statutory duty of the irrigation district is limited to lands under the district. One of the defendants in its brief cites *State v. Farmers Irrigation District,* 116 Neb. 373, as holding that they are not required to drain seeped lands within their district. This case does not so hold. The remedy provided by this statute for the drainage of seeped lands that lie within the district is exclusive as to such lands. The theory upon which this case is presented is that section 21, art. I of the Constitution, provides: "The property of no person shall be taken or damaged for public use without just compensation therefor." The defendants in this case having the undoubted right to convey to and turn water upon the land under their canals and ditches, and not being liable for damages resulting to adjacent land therefrom, except upon the allegation and proof of negligence, and no such allegation or proof having been made in this case, there is not invasion of property. In order to recover under this self-executing section of the Constitution (*Hopper v. Douglas County,* 75 Neb. 332), property must be taken or damaged for a public use. The method of taking or dam-

aging must violate the rights of the owner thereof. It is not established in this case that any right of plaintiffs has been violated. The cases and authorities cited by the plaintiffs supporting their claim upon this theory do not support the view that the owner of a servient tenement may recover from a dominant tenement. In the absence of negligence in the construction, maintenance, operation, and use of its irrigation works, an irrigation district is not liable to an owner of land for seepage under section 21, art. I of the Constitution. Such negligence neither being alleged nor proved in this case, there can be no recovery. Under the facts established by the evidence in this case the operation for many years of the canal and ditches of the Mitchell district, together with the irrigation of the land thereunder, had raised the water table under plaintiffs' land. At no time, however, had such operations threatened to cause seepage upon plaintiffs' land. It was not until the construction and operation of the Gering and Ft. Laramie district's canals and ditches, and the irrigation and cultivation of land in said district, that the seepage appeared. Even if the Mitchell district was negligent in the operation and use of its canal and ditches, recovery could not be had against it, since its negligence was not the proximate cause of the injury. This court has said: "The proximate cause of an injury is that cause which, in the natural and continuous sequence, unaccompanied by any efficient intervening cause, produces the injury, and without which the result would not have occurred." *Spratlen v. Ish,* 100 Neb. 844. Citing this case with approval in *Steenbock v. Omaha Country Club,* 110 Neb. 794, the court further said: "It is not sufficient that the negligence charged furnishes only a condition by which the injury is made possible, for if such condition causes an injury by the subsequent independent act of a third person, the two acts are not concurrent and the existence of the condition is not the proximate cause of the injury." In this case the evidence establishes that the seepage to plaintiffs' land was caused by water seeping from the canals and ditches of the defendants, and from

the application of water for the purpose of irrigation. These percolating waters raised the water table under said land until it came to the surface as seepage. This was augmented by the cultivation of thousands of acres hitherto unbroken sod, upon the construction of the Ft. Laramie Irrigation canal. For over 25 years the identical operation of the Mitchell district had not injured this land. The evidence seems to support the conclusion that, without the intervening contribution of the Gering and Ft. Laramie canal, and the cultivation of a large area draining toward plaintiffs' land, it never would have caused injury. Whether the failure of the Gering and Ft. Laramie Irrigation District to construct drainage ditches to take care of seep and percolating water on its way to return to the river is negligence, as contended by plaintiffs, is a question of fact. It depends upon the facts and circumstances of each particular case, and it is a question for the determination of the jury. The plaintiffs in this case take the position that they seek to recover under section 21, art. I of the Constitution, but at the same time cite numerous cases involving negligence. We conclude that the learned trial judge was correct in his instruction to the jury that the negligence of the defendants was neither alleged nor proved.

We have carefully read the voluminous record in this case, we have had the help of comprehensive briefs, prepared by able counsel, and we conclude that the trial judge was in error in submitting the case to the jury to determine the amount of the damage and render a verdict for the plaintiffs against the defendants, upon the theory that if they had taken or damaged property, under section 21, art. I of the Constitution, they were liable in damages, notwithstanding the fact that, in so far as the record discloses, they were not negligent. Having reached the foregoing conclusions, the discussion of other propositions presented in the briefs is rendered unnecessary. In conformance with the conclusion reached in this opinion, the judgment is reversed and the cause is dismissed.

REVERSED AND DISMISSED.

ROSE and GOOD, JJ., dissenting.

As common carriers of water, defendants exercised the right of eminent domain and constructed, operated and maintained canals and laterals for the purposes of irrigation. Seepage of water carried in the canals and laterals damaged land of plaintiffs and injured their crops without any fault of theirs. The jury so found on abundant evidence of that fact and the trial court entered judgment against defendants on the verdict. On appeal the majority reversed the judgment below and dismissed the action, giving the following among other reasons:

"In this state the owner of an irrigation canal or ditches is not liable to one whose land is injured by seepage from said canal or ditches, not intentionally caused by him, unless he is negligent in the construction or operation of the works. Therefore, the owner of an irrigation canal or ditch is not an insurer against seepage therefrom, but is liable only for negligence and intentional wrongdoing."

In connection with pleas and proofs of damages from seepage, plaintiffs' action is based on the following provision of the Constitution:

"The property of no person shall be taken or damaged for public use without just compensation therefor." Const. art. I, sec. 21.

The right to compensation for property so taken or damaged is absolute. The Constitution imposes no restriction on that right. It does not make negligence the test of a landowner's right to recover damages resulting from an exercise of the power of eminent domain for the purpose of irrigation or for any other purpose. Neither the legislature in granting the right of eminent domain nor the court in exercising judicial power has any authority to make negligence a condition of recovering damages resulting from a violation of that part of the Bill of Rights declaring: "The property of no person shall be taken or damaged for public use without just compensation." Plaintiffs were not legally handicapped by such a condition in an action to recover damages resulting from seepage of water carried

in the canals and laterals operated by defendants. The rulings announced in the opinion would permit defendants, without liability for compensation, to destroy the entire beneficial use of plaintiffs' land by seepage, while conducting waters in their canals and laterals without negligence in construction, maintenance or operation. It was to prevent any such invasion of property rights without compensation that the constitutional provision quoted was inserted in the supreme law by the people of Nebraska. Contrary to the opinion of the majority, the United States circuit court of appeals, eighth circuit, wisely declared the law to be as follows:

"Under Const. Neb. art. I, sec. 21, providing that private property shall not be taken or damaged for public use without just compensation, the owner of an irrigation canal, though constructed under authority from the state for a public service, and maintained and operated in a lawful and careful manner, is liable for damage caused to the land of another as a necessary effect of such operation." *Hooker v. Farmers Irrigation District*, 272 Fed. 600.

The case cited was one to recover damages resulting from seepage of waters conveyed in canals for purposes of irrigation. It arose under the laws of Nebraska and the decision gave effect to the identical constitutional provision now under consideration. In the course of the opinion, which was delivered by Judge Sanborn, it was said:

"If the plaintiff sustained damage, as in our opinion there is substantial evidence here tending to prove, by the temporary negligence of the defendant to so maintain, operate, and use its canal as not to injure plaintiff's property, it is liable on account of its negligence to pay that damage. * * * If, on the other hand, the defendant has inflicted damage upon the property of the plaintiff that is the necessary effect of its permanent maintenance and operation of this canal in a lawful and careful manner, which the state has authorized it to do for the public use, it is liable to pay this damage to the plaintiff because the infliction of such damage without compensation is a violation of the con-

stitutional prohibition against the taking or damaging of private property for public use without just compensation therefor. Constitution of Nebraska, art. I, sec. 21; *Omaha & N. P. R. Co. v. Janecek*, 30 Neb. 276, 27 Am. St. Rep. 399; *Pumpelly v. Green Bay Co.*, 80 U. S. 166, 167, 177, 179, 181, 20 L. Ed. 557; *United States v. Lynah*, 188 U. S. 445, 469, 471, 47 L. Ed. 539; *Bramlette v. Louisville & N. R. Co.*, 113 Ky. 300; *Jaynes v. Omaha Street R. Co.*, 53 Neb. 631, 641, 649, 650, 39 L. R. A. 751; *Middelkamp v. Bessemer Irrigating Ditch Co.*, 46 Colo. 102, 23 L. R. A. n. s. 795."

The rule announced by Judge Sanborn is in harmony with former opinions of the supreme court of Nebraska. In *Stehr v. Mason City & Ft. D. R. Co.*, 77 Neb. 641, it was held:

"Damages recoverable properly include all damages arising from the exercise of eminent domain which cause a diminution in the value of the property."

This ruling does not make negligence a condition of recovery. In *City of Omaha v. Kramer*, 25 Neb. 489, the court said:

"Constitutional guarantees are of little avail unless carried out in the spirit in which they were framed, and no plea of public benefits should be permitted to impoverish the owner of private property, or override a plain constitutional inhibition."

These views of the law necessarily lead to the conclusion that the decision of the majority is unsound.

Note—See Waters, 40 Cyc. 817 n. 83, 829 n. 7, 838 n. 65, 839 n. 73, 74; 1 L. R. A. n. s. 596; 15 R. C. L. 487 et seq.; R. C. L. Perm. Supp. 3940.

HERBERT T. PEMBROOK V. STATE OF NEBRASKA.

FILED FEBRUARY 21, 1930. No. 27088.

1. **Homicide:** SUFFICIENCY OF EVIDENCE. Evidence showing that defendant inflicted eight knife wounds upon deceased, and including testimony of statements made by defendant before and at the time of the fatal encounter, *held* sufficient to support conviction of manslaughter.

2. Criminal Law: CONVICTION: NEW TRIAL. A conviction of a lesser offense than that for which the accused was informed against is not a bar to a prosecution for a greater offense if the accused is granted a new trial.
3. ———: VERDICT: APPEAL. The defendant in a criminal case cannot benefit from the verdict of a jury, if he chooses to appeal therefrom.
4. ———: JUDGMENT: APPEAL: REVERSAL. Reversal of judgment of guilty of murder in second degree and remanding case for new trial placed the defendant in the same position as if no former trial had been had.
5. ———: STATEMENT BY COURT. The court's statement to the jury that the evidence would not justify a verdict of guilty of murder, and that the case was submitted to them only upon the issue of manslaughter, *held* not equivalent to a statement that the court believed the defendant guilty of manslaughter.

ERROR to the district court for Clay county: J. W. JAMES, JUDGE. *Affirmed: Sentence reduced.*

C. L. Stewart and *Waring & Waring,* for plaintiff in error.

C. A. Sorensen, Attorney General, and *George W. Ayers, contra.*

Heard before GOSS, C. J., ROSE, DEAN, GOOD, THOMPSON and EBERLY, JJ., and LANDIS, District Judge.

LANDIS, District Judge.

The plaintiff in error, designated hereafter as defendant, was convicted of manslaughter and sentenced. Of the numerous errors presented in the petition in error, defendant relies on and discusses only four in his brief, namely, insufficiency of the evidence to support the verdict, excessive sentence, overruling of motion to quash, and the filing of the amended information.

This is the second appearance of this cause here, in that a previous conviction of the defendant for second degree murder was reversed and cause remanded for new trial. See *Pembrook v. State,* 117 Neb. 759. Judge Thompson says in that opinion: "At Harvard, in Clay county, in an altercation between one French and the plaintiff in

error, hereinafter called defendant, in which such French was the aggressor, the latter was stabbed several times by defendant with the blade of a small pocket knife, from which wounds French died. * * * Further, we find the record is without proof to sustain a conviction of murder, either in the first or second degree. * * * Also, as French, the deceased, conceived and planned the fatal meeting, and was the aggressor at the start of the altercation, it might be advisable to say we do not want to be understood as holding that this record reflects sufficient evidence to warrant a conviction of the crime of manslaughter; and as a retrial may be had, neither do we think it wise to discuss the indicated facts, notwithstanding we have read with care the entire record."

The evidence in the record now before us, offered by the state, shows that on the afternoon of the tragedy the defendant told John Miller that French's wife had a social disease and was not fit to run a restaurant. This was communicated to French, and on the evening of the same day he called defendant across the street and with Miller took up this statement about his wife, which defendant denied. French then slapped the defendant. At this point Miller left them.

In the first trial, the record of which this court reviewed, the state offered no eye-witness as to what took place between the deceased and the defendant at the time the stabbing was done. In the instant record such a witness was offered in one E. R. Pense. This witness testified: "Herbert Pembrook and Herbert French were standing out on the sidewalk, and Herbert had his back to me, and Herbert Pembrook was facing me; and Herbert Pembrook made a rush at French and stabbed him. Herbert Pembrook says: 'You dirty * * * if you don't let me alone I'll cut your * * * out.'"

The testimony of Dr. Gibbon is that he found eight knife wounds on French's body, which he describes as "a superficial one inch cut half way between the shoulder and elbow upon the dorsal surface of the left arm; another superficial

half inch cut half way between the elbow and wrist on the left arm on the dorsal surface; a four inch cut, about four inches long and two inches deep, in the left buttock, posterior surface; a two inch cut, two inches long and two inches deep, on the lateral surface of the left thigh; a one inch cut, one inch deep, on the ventral surface of the scrotum; a half inch cut on the right side of the scrotum, superficial. I found another cut, a half inch long and two inches deep, low in the right groin, and I found another cut, two inches long and about four inches deep, high up in the right groin, which severed the right external iliac artery. The cut extended upward into the abdominal cavity and severed this artery," and was the fatal one which caused the death of Herbert French. It is without dispute that the defendant inflicted these wounds.

William Seybold testified to a vulgar statement of the defendant some time previous to the tragedy which is premonitory of the two scrotum wounds inflicted. A careful reading of the record convinces us that there is sufficient evidence to support the verdict and the error complained of that the evidence is insufficient cannot be sustained.

As to the errors claimed in allowing the amended information to be filed and in refusing to quash it, the defendant insists that because at the former trial the verdict was guilty of the crime of murder in the second degree, although this was reversed for new trial, he was in effect acquitted of the crime of first degree murder. The precise question is whether a conviction of a lesser offense than that for which the accused was informed against is a bar to further prosecution for the greater offense if the accused is granted a new trial. Nebraska is committed to the position that the defendant cannot benefit by the verdict of the jury, if he chooses to appeal from it. The reversal of the judgment of guilty of murder in the second degree and the remanding of the case for new trial placed the defendant in the same position he would have been had no former trial been had, and the whole case is open for investigation. *Clarence v. State,* 89 Neb. 762.

The defendant further contends that by stating to the jury that they would not be warranted under the evidence in finding the defendant guilty of murder in either the first or the second degree, and that the case was being tried and submitted to them only upon the issue of manslaughter, is equivalent to telling the jury that the court believed that the defendant should be found guilty of manslaughter. We cannot agree with this, because it is based on the assumed premise that the jury were not intelligent and deliberately disregarded their oath. The long experience of the race is behind our jury system. This method of determining facts is peculiarly a development of our jurisprudence, of which we are justly proud. This jury received carefully prepared instructions, fully protecting the rights of the defendant, and we are not prepared, upon this record, to say that the twelve men, bringing their experience and common sense to a consideration of this case, deliberately misconstrued plain instructions, and inferred an opinion of the court as a basis of their verdict.

The sole issue submitted to the jury was manslaughter, and the court did not err in allowing the amended information to be filed or in refusing to quash it.

Defendant claims his ten year sentence for manslaughter is excessive. The record reflects nauseating, disgusting, vile and primitive acts and instincts. From the method and way of living of the defendant, society should be protected. He is close to 50 years of age and has been in continuous confinement since his arrest on September 19, 1927. Probably the ultimate interests of society, as well as of the defendant, would best be conserved if the judgment be modified. While the record sustains the verdict of the jury, and is free from prejudicial error, yet it does show that deceased was a large, powerful, robust man; the defendant a much smaller man, and that on two former occasions the defendant was viciously and brutally assaulted by the deceased. After carefully considering the whole record, we are inclined to the view that there are grounds upon which the defendant may base argument against receiving the limit under a conviction of manslaughter.

Under provisions of section 10186, Comp. St. 1922, the judgment of the district court is modified to the extent that the defendant shall serve a term of five years. As thus modified, the judgment is affirmed.

AFFIRMED: SENTENCE REDUCED.

IVAN WILCOX V. STATE OF NEBRASKA.

FILED FEBRUARY 21, 1930. NO. 27207.

1. Bail: RECOGNIZANCE: SUFFICIENCY. Recognizance on appeal from conviction in county court of statutory misdemeanor, conditioned that appellant appear on designated day, which was first day of third term after rendition of judgment, and which did not require appellant to abide judgment of district court, was invalid under section 1, ch. 113, Laws 1923, and conferred no jurisdiction on district court, the fact that no jury was summoned for intervening terms not justifying noncompliance of recognizance with statutory requirements, since under chapter 70, Laws 1925, the district court had power to order a jury at either of such terms.
2. ———: ———: ESTOPPEL. That the county attorney appeared before the district judge and sought to have appellant's recognizance on appeal from conviction of a statutory misdemeanor forfeited for nonappearance on date stipulated in the recognizance does not work an estoppel precluding dismissal of appeal as previously ordered by the district court for noncompliance with section 1, ch. 113, Laws 1923.

ERROR to the district court for Furnas county: CHARLES E. ELDRED, JUDGE. *Affirmed.*

Perry, Van Pelt & Marti and *Pierce & Simmons*, for plaintiff in error.

C. A. Sorensen, Attorney General, and *Clifford L. Rein, contra.*

Heard before GOSS, C. J., ROSE, GOOD, THOMPSON, EBERLY and DAY, JJ., and LANDIS, District Judge.

LANDIS, District Judge.

Plaintiff in error here, defendant below, was convicted in the county court of a statutory misdemeanor, and at-

tempted to appeal to the district court, where the appeal, on motion of the state, was dismissed because the recognizance for the appeal was not in conformity with statutory requirements.

The recognizance for the appeal was given and approved April 3, 1929, and conditioned that the defendant appear before the district court on the 18th day of November, 1929, and from time to time, term to term, and not depart the court without leave. On April 3, one of the days of the March, 1929, term thereof, the district court was in session. The next session of the district court was when the May, 1929, term convened on May 27. November 18, 1929, was the first day of an announced November, 1929, jury term, being the next succeeding term after the May, 1929, term of the court.

Chapter 113, Laws 1923, regulates appeals from county courts in misdemeanor cases. Section 1 of that chapter provides, in substance, that no appeal shall be granted unless appellant shall enter into a written recognizance, conditioned for his appearance forthwith, and without further notice, to the district court, and from day to day thereafter, until the final disposition of such appeal, to answer the complaint against him and to abide the judgment of the district court.

The recognizance given in the instant case is not strictly in accord with the requirements of the statute. Instead of requiring defendant to appear forthwith, it requires him to appear November 18, 1929, which, considering the March and May terms of the district court, would be the first day of the third term after the rendition of the judgment on April 3, 1929. The recognizance does not require defendant to appear from day to day, and fails to bind him to abide the judgment of the district court.

Defendant contends that the day named in his recognizance is the same as "forthwith." This is based on the fact that no jury term of court had been announced by the district judge, other than the term beginning November 18, 1929, at the time the recognizance was executed. The fact

that a jury would be called for the November, 1929, term of the district court did not mean that there would be no jury called for the May, 1929, term, or even after the jury was discharged for the March, 1929, term on April 2, 1929, as the record herein shows, that one would not be called for the last period of such term.

On the first day of January of each year the judges of the district court fix the time for holding terms of court in the counties comprising their respective districts during the ensuing year, as provided in section 1085, Comp. St. 1922, but there is no requirement that the jury terms should then be fixed finally and absolutely. The court could have ordered a jury, if necessary or expedient to try the defendant at a later period in March, 1929, or in May, 1929, terms. Laws 1925, ch. 70. It is for the court to determine the matter of calling the jury, and for the defendant to appear "forthwith." It is obvious that the day selected by the defendant in his recognizance under this record is not the same as "forthwith."

The instant recognizance did not comply substantially with the statutory requirements, is invalid, conferred no jurisdiction on the district court, and is ruled by the decisions of this court in *Killian v. State*, 114 Neb. 4, and *Oppfelt v. State*, 117 Neb. 549.

Counsel for plaintiff in error rely upon *Abbott v. State*, 117 Neb. 350. This case announces the rule that the word "forthwith," as used in the statute relating to the appearance of a defendant in a criminal case in the district court, means the first opportunity offered defendant, after appeal is perfected, to appear when said court is in session. There the recognizance was conditioned for defendant's appearance on the first day of the next jury term of the district court, which was, in fact, the first day when that court held a session at which he could appear. It was, therefore, equivalent to requiring him to appear forthwith.

In the instant case, the recognizance was for the appearance on November 18, 1929, after two sessions of the district court in two different terms at which defendant could

have appeared. Clearly *Abbott v. State, supra,* is not in point. Moreover, plaintiff in error failed to comply with the statute requiring him to appear from day to day and abide the judgment of the district court.

On May 27, 1929, the district court dismissed the appeal. On August 27, 1929, error proceedings were filed in this court. By supplemental transcript plaintiff in error shows that the county attorney appeared before the district judge and sought to have the bond involved herein forfeited on the ground that the defendant did not appear for trial on November 18, 1929.

Plaintiff in error claims that the county attorney by asking a forfeiture of the bond has recognized its validity and that the state is now estopped to deny the same. This contention of plaintiff in error is not tenable, because he has not changed his position or condition by reason of the action of the county attorney and has not been prejudiced thereby. Neither could the act of the county attorney in seeking a forfeiture of the bond operate to confer jurisdiction on the court to determine the appeal on its merits. The district court did not err in dismissing the appeal. The judgment is

AFFIRMED.

SARAH BAKER ET AL., APPELLEES, V. JAMES C. DAHLMAN ET AL., APPELLANTS.

FILED FEBRUARY 21, 1930. No. 26990.

1. **Municipal Corporations: POWERS: CONSTRUCTION: STREET IMPROVEMENTS.** The power delegated to a city to construct local improvements and levy special assessments for the payment thereof is to be strictly construed against the city, and every reasonable doubt as to the extent of limitation of said power is to be resolved against the city.
2. **———: STREET IMPROVEMENTS: AUTHORIZATION.** *Held,* in this case, that section 3571, Comp. St. 1922, does not authorize the resurfacing of more than a single street in the same proceeding; and that the improvement made was without authority of law because no petition of the property owners was obtained as a condition precedent thereto.

APPEAL from the district court for Douglas county: WILLIAM G. HASTINGS, JUDGE. *Affirmed.*

John F. Moriarty, Thomas J. O'Brien and *B. J. Boyle*, for appellants.

A. H. Murdock and *J. P. Breen, contra.*

Heard before GOSS, C. J., GOOD, THOMPSON, EBERLY and DAY, JJ., and FOSTER and SHEPHERD, District Judges.

SHEPHERD, District Judge.

The instant case involves the resurfacing of a number of contiguous and intersecting streets in Omaha, quite a large district in the residence portion of the city. The city council proceeded under section 3571, Comp. St. 1922, which provides for the surfacing of a street or part of a street without obtaining a petition from the adjoining property owners, and charged the cost to the abutting property. The plaintiffs (appellees here) brought suit to enjoin the collection of the special assessments and to cancel the same. Upon trial the district court entered a decree in favor of the plaintiffs, finding that the work had been done without authority of law, ordering the cancelation of the said assessments, and enjoining the defendants (appellants here) from attempting to collect the same.

The decision of the district court went upon the theory that, since the project was to resurface a number of streets, rather than a single street, or part of a street, it became necessary to secure a petition signed by a majority of the front foot owners adjoining, before the work could proceed. If it be determined that the trial court was right in that particular, such determination will dispose of eight of the nine assignments of error relied upon by the appellants, as assignments to that number are grouped around and upon this specific point.

The Omaha charter, chapter 40, Comp. St. 1922, provides in sections 3555 and 3556 that the council may improve main thoroughfares leading out of the city and city streets generally within a mile and a half of the city hall without

petition, and it declares in section 3557 that, except as otherwise provided, the council shall not order any street improvements or cause the same to be made. It is conceded in the record that neither of these exceptions cover the case at bar.

Immediately following in the act is section 3558 in these words: "The city council may, upon a petition of the record owners of a majority of the frontage of taxable property upon the streets or parts of streets within a district created for that purpose, order any street or any number of consecutive streets which extend in the same general direction, together with the parts of streets, alleys and ways either intersecting or connecting therewith, improved within reasonable, appropriate or necessary limits, in one proceeding and in one improvement district by causing the same in whole or in part to be paved, repaved, curbed or recurbed or the grades changed or graded, or the paving surfaced, resurfaced or relaid, or any combination of such work to be done, including as well the change of grade and grading, or either or both, on any of the streets or ways within such district." Obviously this is the general section authorizing street improvement in the metropolitan city.

But there is a third exception, the one depended upon by appellants in this case, a permission to the council to resurface without petition therefor if no protest is made within thirty days after publication of official resolution to that end. This permission is to be found in the section of the statutes first above mentioned (section 3571), also a part of the Omaha charter. It reads as follows: "Whenever it is desired to surface or renew the surface, to change the character of the existing pavement or the surface thereof upon a street or part thereof, the city council may by proper resolution for that purpose propose such improvement, stating the specific character of the improvement thus to be made." And a second paragraph of the section sets forth the particulars of the notice and prescribes the method of assessing the cost to the property adjoining.

The question is whether this third exception, limited as

by its terms appears, may be extended to the resurfacing of a number of streets in combination under one proceeding, or whether it is limited to the one street, or part of one street, which the language of the act naturally indicates. Certainly the rule of strict construction commonly employed when charges are imposed upon the property of the citizen inclines the reader to the latter view. And the rule of construction which gives to well known words their common and ordinary meaning supports that view.

We think the council assumed a power not conferred upon it by the statute in attempting the resurfacing of a district made up of a number of consecutive and intersecting streets under section 3571 and without a petition of the property owners. And an improvement without power cannot be made the basis of a special assessment against the property of the citizen.

Said section 3558 prescribes the steps by which the city council may proceed with paving, resurfacing and street improvements generally. It is quite evident, considering the two sections in connection with the other parts of the act, that it was intended that street improvements should not as a general thing be made a charge upon adjoining property, without petition, and that section 3571 is an exception to the rule. Section 3558 provides for the paving of one or many streets in one proceeding, and for the surfacing or resurfacing of one or many streets in one proceeding, using language that leaves no doubt of what was in the legislative mind; and if it had been intended by section 3571 to permit resurfacing to an unlimited degree without petition the legislature would have said so in words that would have been certain.

More or less frequently in a large city a particular street, or part of a street, is bound to need resurfacing or even repaving because of heavy traffic or some particular development in city growth; and speedy action becomes highly desirable. There can be little doubt that the legislature had this need in mind when it enacted section 3571 to follow section 3558 in the Omaha charter; and it is equally prob-

able that in so doing it meant to confine the power conferred upon the council to the narrow limits of a single street, so that while the need was met the adjoining owner might remain secure from imposition. Interpreting section 3571 in this way, the two statutes admirably take care of whatever situation may arise.

It is plain that in a limited district, not greater than a street, it would be comparatively easy to make the protest necessary to stop an improper proceeding originating in the council, while in a large district, composed of many streets and cross streets, it would be correspondingly difficult. In the large district it would be very hard indeed to obtain a protest of 40 per cent. of the property owners in the short space of 30 days. It is significant that in the large district the requirement of petition protects the citizen, while in one small district the provision for protest answers the same purpose.

It is not to be forgotten that section 3571 empowers the city council to change the character of the existing pavement as well as to resurface. The extension of area from the single street to a number of streets by judicial interpretation would give the council a power that was never intended by the legislature, a power that might be used to the point of confiscation.

It is true that in one or two of the states it has been held that legislative permission to improve a street gives warrant to improve a number of connected streets, but not, we think, in any case in which the statutory provisions are similar to those of Nebraska. In the Illinois case cited, *Wilbur v. City of Springfield*, 123 Ill. 395, the question was rather whether a number of streets could be connected under one proceeding for improvement where the work on the several streets was somewhat different as to character and amount. And it was there held that, where the work did not differ to such degree as to make it entirely out of the question to fairly apportion the cost, the difficulty of the situation would not be allowed to invalidate the work done. In addition to this, the law under which the im-

provement proceeded provided in substance that the council might proceed to improve "any of the streets of the city," a descriptive phrase different from that in question in this case, and one that might more easily be construed to mean any number of the city's streets. The South Dakota case, *Wood v. City of Hurley*, 29 S. Dak. 269, is somewhat in point, though it applies to sidewalks. But, in view of the statutory provisions here involved, it can hardly be an authority in the instant case. The other cases cited in the briefs of the appellants have been examined with care and found inapplicable. To discuss them seems unnecessary.

In the case of *Brown Real Estate Co. v. Lancaster County*, 108 Neb. 514, the court held that a provision of law for the paving of "any road, highway or boulevard" authorized the inclusion of parts of a number of country roads in a drive or boulevard to state institutions close to the city of Lincoln, saying that, if a neighborhood is better accommodated by an improvement in the form of a circle than by a straight line, the law did not forbid it. But it indicated in the same case that such a rule would not apply to paving in cities, and stated that it had been held that separate streets in cities cannot be included in a single improvement.

So, indeed, the court had decided in *Hutchinson v. City of Omaha*, 52 Neb. 345, in which the legislative provision was that the council was given power to open and improve any street, avenue or alley within the limits of the city. The court held in its opinion that the grant of power was to grade "any street" and that there was no express authority to join several streets in a single improvement. Owing to the nature of the controversy in the case at bar, the following language from the opinion is peculiarly apropos:

"Recurring to the charter, we find the grant of power is to grade 'any street.' This is followed by express permission to grade a part of the street. There is no express authority to join several streets in a single improvement and to charge upon the owners of land abutting upon one the expense of grading another. Nor do we think that we

have any right to imply such authority from the language of the charter. That such a measure would in some instances be more economical and of actual advantage to property owners is wholly aside from the question. That was a matter for the legislature to determine, and such a power cannot be sustained by the courts, merely from motives of expediency, in the absence of legislative authority."

The rule of strict construction in matters of this kind obtains in this state. In a comparatively late case the court said: "The power delegated to a city to construct local improvements and levy special assessments for the payment thereof is to be strictly construed against the city, and every reasonable doubt as to the extent or limitation of said power is resolved against the city." *Futscher v. Rulo*, 107 Neb. 521. In the *Hutchinson* case, *supra*, there is a similar expression: "It is no less familiar that statutes authorizing the exercise of such power are to be strictly construed."

A final assignment remains to be considered, the assignment that the finding of the district court that the action was brought by the plaintiffs for themselves and all other property owners similarly situated is contrary to law. The petition filed in the district court recites that the matter involved herein is a matter of common interest to the plaintiffs and to all other persons similarly situated and owning property in the district, and that plaintiffs bring their action in behalf of themselves and all other property owners similarly situated within that part of the city of Omaha included in said district. The situation is such as to permit a proceeding of this nature by one or more persons in behalf of many, and the pleading is sufficient to that end. No objection or protest seems to have been made to the case as a case in behalf of all persons in the district, and the trial seems to have proceeded upon that theory. We think that the trial court made no mistake in its finding.

From the conclusions arrived at, it follows that the judgment of the district court is

AFFIRMED.

DAY, J., dissents.

WILLIAM H. SMOKE, APPELLANT, V. ELSIE POPE, APPELLEE.

FILED FEBRUARY 28, 1930. No. 27105.

1. **Vendor and Purchaser**: POSSESSION: NOTICE. Possession of land may be notice to the world of possessory rights of which inquiry of the occupant would elicit knowledge.
2. ———: ———: ———. In entering into a contract to purchase land in possession of a third person, the purchaser is bound to inquire about the occupant's interest therein.
3. ———: PURCHASER IN GOOD FAITH. One purchasing land with knowledge of another's previous contract to purchase it is not a purchaser in good faith and will not be protected as such if his knowledge was acquired before paying the purchase price.
4. ———: CONTRACT: REFORMATION: SPECIFIC PERFORMANCE. Equity may reform a contract for the purchase of land so as to include terms upon which the parties definitely agreed and may also require specific performance of the contract as reformed.
5. **Specific Performance**: DAMAGES. In a suit in equity for specific performance, attorney's fees and other expenses of litigation are not, as a general rule, recoverable as damages resulting from breach of contract to sell and convey land.

APPEAL from the district court for Dawes county: EARL L. MEYER, JUDGE. *Affirmed as modified.*

Allen G. Fisher and *Charles A. Fisher*, for appellant.

E. D. Crites and *F. A. Crites, contra.*

Heard before GOSS, C. J., ROSE, DEAN, GOOD, THOMPSON, EBERLY and DAY, JJ.

ROSE, J.

This is a suit in equity to reform and to specifically enforce a written contract for the sale and purchase of 30 acres of land in the southwest quarter of section 19, township 33, range 48, Dawes county. The quarter section described is bounded on the west and south by section-line highways. East and west the 30-acre tract is 2,580.5 feet long. North and south it is 505.5 feet wide. Its west end is 33 feet from the section line or from the center of the highway running north and south and its south side is 33 feet from the section line or from the center of the highway running east and west. It does not include any land

occupied by the section-line highways. William H. Smoke is plaintiff and, by purchase from Elsie Pope, defendant, claims the 30-acre tract described. Defendant asserted that the land sold by her to plaintiff extends to the section lines or to the center of the highways on the west and south; that it was so described in the contract of sale and that she tendered a deed conforming thereto; that she sold and conveyed to Clarence E. Chamberlain a 50-acre tract north of the 30-acre tract sold to plaintiff; that the deed to Chamberlain contained two acres of land along the north side of the strip claimed by plaintiff; that defendant, not being the owner of the two acres of land in controversy, cannot convey it to plaintiff. The pleadings put in issue the facts in controversy. Upon a trial of the cause the district court found generally in favor of plaintiff and reformed his contract of purchase so as to include the two acres in litigation but did not decree specific performance of the contract as reformed or require defendant to execute and deliver to plaintiff a warranty deed for the 30 acres of land described in the petition. To obtain complete relief plaintiff appealed.

From that part of the decree reforming the contract neither party appealed. In restoring the terms upon which the parties definitely and specifically agreed the district court made no mistake. No other conclusion could properly be reached upon a trial *de novo*. Defendant sold and plaintiff purchased 30 acres of land free from incumbrances and easements. The western and southern boundaries of the tract were definitely pointed out to plaintiff by defendant and were east and north of the highways. The purchase price was $60 an acre. Plaintiff made a cash payment of $100 and paid the remainder, or $1,700, before maturity and before receiving a deed or an abstract. He was not estopped by the erroneous description in the written instrument. He refused to accept the deed describing the western and southern boundaries as the center of the highways. He took and continuously retained possession of the 30-acre tract east and north of the highways. He fenced the

premises in fact purchased and made other valuable and lasting improvements thereon. He refused to surrender to defendant or to her grantee, Chamberlain, any part of the land which he claims to have purchased. That part of the decree reforming the contract, therefore, will not be disturbed.

Was plaintiff entitled to a decree requiring defendant to execute and deliver to him a warranty deed for the 30 acres of land described in the contract as reformed? While the record shows that defendant entered into a subsequent contract to sell and convey to Chamberlain two acres of land she had previously sold to plaintiff and that she afterward executed and delivered a deed therefor, this is no defense whatever to the suit in equity for specific performance of her reformed contract with plaintiff. Chamberlain was not an innocent purchaser of the two-acre strip of land. Before accepting his deed and before parting in full with the purchase price of the 50-acre tract which he had agreed to purchase from defendant, he knew that plaintiff was in possession of the 30-acre tract on the south, including the two acres of land in controversy. Chamberlain also knew the nature of plaintiff's claim to his right of possession. This is conclusively shown by the evidence. Possession was notice to the world of possessory rights of which inquiry of the occupant would elicit knowledge. In entering into a contract to purchase land in possession of plaintiff, Chamberlain was bound to inquire about the former's interest therein. *Dengler v. Fowler*, 94 Neb. 621.

In an independent action at law, Chamberlain proceeded against Smoke by forcible entry and detainer to acquire possession of the identical two acres involved in the present suit in equity. The district court for Dawes county, wherein the action was pending, found the issues in favor of Smoke, specifically recognized his equitable right to a reformation of his contract to purchase the 30-acre tract so as to include the two acres of land now in litigation and dismissed the action at law. A copy of the final judgment therein was

admitted as evidence in the equity suit. The law applicable to the facts therein has been stated as follows:

"A party who purchases real estate with knowledge that another has a contract of purchase for the same is not a *bona fide* purchaser; and if he acquires such knowledge at any time before the payment of the consideration, he will not be protected as a purchaser in good faith." *Veith v. McMurtry*, 26 Neb. 341; *Barney v. Chamberlain*, 85 Neb. 785. See, also, *Bowman v. Griffith*, 35 Neb. 361; *Dundee Realty Co. v. Leavitt*, 87 Neb. 711; *McParland v. Peters*, 87 Neb. 829.

The conclusion is that plaintiff was entitled to specific performance of his contract of purchase as reformed and the decree of the district court will be modified accordingly.

Another question is presented for determination. By pleading and proof plaintiff sought to recover attorney's fees and other expenses of litigation as damages resulting from defendant's breach of her contract to convey the entire tract of land sold and for which she received payment in full. The claim therefor was rejected below and plaintiff presented it for allowance on appeal. Expensive litigation was caused by defendant's breach of contract, but the law does not seem to authorize a recovery for such a claim. *Toop v. Palmer*, 108 Neb. 850.

The decree of the district court is modified to require specific performance by ordering defendant to execute and deliver to plaintiff a good and sufficient warranty deed to the 30 acres of land described in the contract as reformed. In the event of her failure to do so, the decree as so modified will operate as such a conveyance. The costs in both courts will be taxed to defendant. As thus modified, the decree of the district court is affirmed.

AFFIRMED AS MODIFIED.

STATE, EX REL. O. S. SPILLMAN, ATTORNEY GENERAL, APPELLEE, V. WILLIAM SPLITTGERBER ET AL., APPELLANTS.

FILED FEBRUARY 28, 1930. NO. 27060.

1. **Animals: TUBERCULIN TEST: POLICE POWER.** The legislature may in the exercise of the police power require that the owners of breeding cattle submit such animals to the tuberculin test and may adopt reasonable measures for carrying out the requirement.
2. **Constitutional Law: ANIMALS: CLASSIFICATION: TUBERCULIN TEST.** The legislature may use its discretion in adopting a classification making a distinction between the testing of breeding cattle and feeding cattle when the object to be accomplished is for the public interest.
3. **Animals: TUBERCULIN TEST: POLICE POWER.** "It is within the province of the legislature in the exercise of police power to require the examination, inspection and testing of cattle for bovine tuberculosis, and if such disease is found to exist, to make provisions for the summary destruction of the diseased animals." *State v. Heldt*, 115 Neb. 435.

APPEAL from the district court for Wayne county: DE WITT C. CHASE, JUDGE. *Affirmed.*

North, Caldwell & Gillogly, for appellants.

C. A. Sorensen, Attorney General, and *Peterson & Devoe, contra.*

Heard before GOSS, C. J., ROSE, DEAN, GOOD, EBERLY and DAY, JJ., and MESSMORE, District Judge.

DEAN, J.

This action was begun by the state, in the district court for Wayne county, on the relation of O. S. Spillman, then attorney general, as plaintiff, to enjoin William Splittgerber and Gus Splittgerber, defendants, from "obstructing or preventing by force or otherwise any member or agent of the department of agriculture," hereinafter called the department, from applying the tuberculin test to defendants' cattle, pursuant to the provisions of chapter 12, Laws 1927. Defendants contend that the act is unconstitutional, and they seek by cross-petition to have the agents of the de-

partment enjoined and restrained from entering their premises for the purpose of applying the tuberculin test to defendants' cattle. The court found for the plaintiff and the defendants Splittgerber have appealed.

Section 1, art. I, ch. 12, Laws 1927, follows:

"The department of agriculture shall be vested with the power and charged with the duties of protecting the health of live stock in Nebraska, of determining and employing the most efficient and practical means for the prevention, suppression, control and eradication of dangerous, infectious, contagious or otherwise transmissible diseases among domestic animals, and to that end of placing in quarantine any county or part of any county, or any private premises, or private or public stockyards, and of quarantining any domestic animal or animals infected with such disease or which have been, or are suspected of having been, exposed to infection therefrom, and of killing any animal so infected, and of regulating or prohibiting the arrival into and departure from and movement within the state of animals infected with such disease or exposed, or suspected of having been exposed, to the cause, infection or contagion therefrom, and, at the cost of the owner, of detaining any domestic animal found in violation of any departmental or statutory regulation or prohibition."

Article II, ch. 12, Laws 1927, provides generally that, when a petition signed by 60 per cent. or more of the owners of 51 per cent. of breeding cattle in a county, as disclosed by the last assessment rolls, shall be presented to the department asking that all breeding cattle herds be tested for tuberculosis, the department shall fix a time for a hearing upon the petition and shall cause a notice to be published in the county for three weeks previous to the time fixed for such inspection. The act also provides that, when the petition is declared sufficient, the department shall thereupon declare the county in which the petitioners reside an area for the inspection, examination, and testing of the breeding cattle therein for tuberculosis. When such area is established, a time shall be fixed and a notice thereof

published for the inspection of such breeding cattle. The act also provides that steers and other cattle in feed lots, being fed for market, and steers brought in for feeding and grazing purposes, shall be exempt from such test when kept apart from the tested cattle under the rules of the department. And the law also provides for compensation to the owner for any animals found affected with tuberculosis and subsequently slaughtered. The foregoing requirements were substantially complied with by the department in apt time for making the inspection complained of.

The record discloses that from January 10 to July 30, 1927, a total of 1,188 herds of breeding cattle, numbering 17,426 cattle in all, were tuberculin tested, and all of this testing was performed in Wayne county on a cooperative basis between the United States bureau of animal industry and the state department.

A test of defendants' cattle was commenced May 16, 1927, and completed May 21, and 80 head of cattle were tested, and of this number five were classified as reactors to the tuberculin test and were shipped to Omaha. The chief of the bureau of animal industry testified that these five cattle were appraised as to their value, but the records of the department do not show whether payment has been made in part by the federal government and in part by the state government, as the defendants had not then signed the necessary papers. A witness, being called in respect of this feature, testified that, so far as they were able to discover, the testing of all of the herds of breeding cattle in Wayne county had been completed, with the exception of the defendants' cattle, and that an order was issued accrediting the county. This witness also testified that, after the discovery of tuberculosis among defendants' cattle, such cattle were placed in quarantine.

Denial is made by defendants that all of the herds of cattle in Wayne county have been tuberculin tested, and the contention is made that tubercular cattle are feeding on each side of the pasture in which defendants have their

breeding cattle, and that the feeding cattle mingle with defendants' cattle and no effort has been made by the department to test any of such feeding cattle for tuberculosis. They also contend that the law governing the testing of breeding cattle is unconstitutional, in that it discriminates between such cattle and feeding cattle, and that both feeding and breeding cattle are susceptible to tuberculosis. We do not think the omission by the legislature to provide for the inspection of feeding cattle is a discrimination against the owners of breeding cattle as asserted. Feeding cattle are of course raised for market and must necessarily pass through many stages of inspection and the like before the meat product finally reaches the public for consumption. That the existence of tuberculosis in breeding and dairy cattle is a menace to the public health both of infants and adults is a matter of common knowledge.

The act in question here has been construed by us in *State v. Heldt*, 115 Neb. 435, wherein this court, in a well-reasoned opinion by our late lamented associate, Judge George A. Day, announced the following rule:

"It is within the province of the legislature in the exercise of police power to require the examination, inspection and testing of cattle for bovine tuberculosis, and if such disease is found to exist, to make provisions for the summary destruction of the diseased animals."

And in the present case, as in *State v. Wallace*, 117 Neb. 588, we reaffirm the pronouncement in the *Heldt* case in every material particular. See, also, *State v. Kistler, ante*, p. 89.

It must appeal to every unbiased mind that the legislature is warranted in its solicitude for the public health and welfare as disclosed by the facts in the present case. The legislature may in the exercise of the police power require that the owners of breeding cattle submit such animals to the tuberculin test and may adopt reasonable measures for carrying out the requirement. *Fevold v. Board of Supervisors*, 202 Ia. 1019. And the legislature may use its discretion in adopting a classification making a distinction be-

tween the testing of breeding cattle and feeding cattle when the object to be accomplished is for the public interest. In *Schulte v. Fitch*, 162 Minn. 184, the Minnesota court made this timely observation: "Statutes to promote and protect the public health by suppressing tuberculosis among domestic animals are for a public purpose. Laws for promoting and protecting the public health are liberally construed to accomplish the intended purpose."

In view of the facts before us and of the law applicable thereto, we conclude that the judgment must be and it hereby is

AFFIRMED.

STATE, EX REL. ELEANOR A. OLESON, APPELLANT, V. BEN F. GRAUNKE, COUNTY TREASURER, ET AL., APPELLEES.

FILED FEBRUARY 28, 1930. No. 27334.

1. Automobiles: LICENSE TO DRIVE. Section 5, ch. 148, Laws 1929, construed, and *held* to deny to any person, under 16 years of age, the right to a license to drive a motor vehicle.
2. ———: ———: POLICE POWER. The state, in the exercise of its police power, may limit the operation of motor vehicles on its highways to persons who have attained a specific age, if the age limitation is not arbitrary or unreasonable. Limiting to persons who have attained the age of 16 years the right to a license to operate motor vehicles is neither arbitrary nor unreasonable.
3. ———: ———: CONSTITUTIONAL LAW. A statute that denies to persons under 16 years of age the right to a license to drive a motor vehicle does not have the effect of depriving persons, under 16 years of age, owning automobiles, of property without due process of law.

APPEAL from the district court for Cuming county: CHARLES H. STEWART, JUDGE. *Affirmed.*

A. R. Oleson, for appellant.

C. A. Sorensen, Attorney General, and *Clifford L. Rein, contra.*

Heard before GOSS, C. J., ROSE, DEAN, GOOD, EBERLY and DAY, JJ., and MESSMORE, District Judge.

GOOD, J.

Relator, a young woman under 16 years of age, sought a peremptory writ of mandamus to compel the county treasurer of Cuming county and the secretary of the department of public works of the state of Nebraska to issue to her an automobile driver's license. The trial court denied the writ, and relator appeals.

The appeal involves a proper interpretation of section 5, ch. 148, Laws 1929, which is as follows: "If the application to operate a motor vehicle required by this act discloses that the applicant for such license suffers from a physical defect or defects of a character which may affect the safety of operation by such applicant of a motor vehicle, the examiner may require such applicant to show cause why such license should be granted, and may require such applicant through personal examination and demonstration as may be prescribed by the department of public works to show the necessary ability to safely operate a motor vehicle on the public highways; and if the examiner be satisfied, after such demonstration, that such applicant has the ability to safely operate such motor vehicle, a license may be issued to the applicant, subject, however, to a limitation to operate only such motor vehicles as the license shall designate at the discretion of the department of public works. No license shall, under any circumstances, be issued to any person who has not attained the age of full sixteen (16) years: Provided, however, that prior to January 1, 1930, licenses shall be granted without examination to all applicants as a matter of course, who have driven an automobile for more than six months prior to the date of application, and who shall so state in said application."

The record discloses that relator is a competent driver and had driven an automobile for a period of more than six months prior to the time of making application for a license. She contends that, under the proviso of section 5, she is entitled to a driver's license as a matter of course. We do not think the contention is sound.

Section 8391, Comp. St. 1922, which has been in force

for many years, makes it unlawful for any person, under 16 years of age, to operate a motor vehicle upon the highway. The legislature of 1929 was of course familiar with that statutory provision. It seems incredible that the legislature would authorize the issuance of a license for any person to do an unlawful act. Moreover, said section 5 specifically provides: "No license shall, under any circumstances, be issued to any person who has not attained the age of full sixteen (16) years." In view of this specific provision and the then existing legislation, making it unlawful for any person under 16 years of age to operate a motor vehicle upon the highways, it seems clear that the proviso in section 5 was intended to relate to the taking of the examination, and other matters, in the earlier part of the section, and was not intended to authorize the issuance of a license to any one under 16 years of age.

Relator contends that because she had, in previous years, been granted an owner's automobile license she was entitled to a driver's license, so that she, herself, might operate her car, and that to deprive her of a driver's license is in violation of the Fourteenth Amendment to the Constitution of the United States and violative of the Constitution of Nebraska, in that it deprives her of her property without due process of law.

The refusal of a driver's license does not operate to deprive relator of her automobile. She may sell the vehicle or permit its use by any one who is authorized by law to drive it upon the highway. The act, however, restricts driving of the car on the highways to those who possess a driver's license.

In the exercise of its police power, the state, by appropriate legislation, may control and regulate the manner in which motor vehicles may be operated, and may prescribe reasonable limitations as to the classes of persons that may operate them. A motor vehicle, while not in use, is a harmless instrument, but when put in operation upon the highway it may become, in the hands of the incompetent or inexperienced, a danger and menace to the public. We

think no one will contend that it would be an improper exercise of the police power to prohibit persons under 10 years of age, or those whose sense of hearing or sight is seriously defective, from operating a motor vehicle. The question is whether the classification is reasonable. It is quite possible that some persons under the age of 16 years are more apt than others in learning to operate motor vehicles, and perhaps more apt than many adults, but the fact remains that, as a class, they have not, at that age, attained the discretion and judgment which would make it safe for them to operate motor vehicles upon the highway. The line must be drawn somewhere, and the only question is whether the legislature acted arbitrarily or reasonably in drawing the line at 16 years of age.

We are of the opinion that the limit of 16 years is not arbitrary but is a reasonable exercise of the police power, and that the act, restricting automobile drivers to persons over 16 years of age, is not violative of either the state or federal Constitutions, which forbid the taking of private property without due process.

The record is free from error, and the judgment is

AFFIRMED.

JERRY R. VRBSKY, APPELLANT, V. GEORGE ARENDT ET AL., APPELLEES.

FILED FEBRUARY 28, 1930. No. 26841.

1. **Fraud**: TIME OF DISCOVERY: QUESTION FOR JURY. In an action at law to recover damages sustained through fraud, the question as to time when plaintiff discovered the fraud, or facts constituting the fraud, or facts sufficient to put a person of ordinary intelligence and prudence on inquiry which would lead to the discovery, is one of fact for the determination of the jury in the same manner as other questions of fact.
2. **Trial**: DIRECTION OF VERDICT. The trial court should not direct a verdict of the jury unless the evidence is so clear upon every point upon which the verdict may depend that reasonable minds cannot come to any other conclusion. *Bank of Cortland v. Maxey*, 102 Neb. 20.

APPEAL from the district court for Lancaster county: MASON WHEELER, JUDGE. *Reversed.*

John E. Mekota, Claude S. Wilson, Roy F. Gilkeson and *Hymen Rosenberg,* for appellant.

C. C. Flansburg, W. T. Thompson, Perrin & Kier and *M. V. Beghtol, contra.*

Heard before GOSS, C. J., ROSE, DEAN, GOOD, EBERLY and DAY, JJ., and MESSMORE, District Judge.

DAY, J.

The plaintiff brought an action at law to recover $14,000 damages alleged to have been sustained by virtue of a conspiracy to defraud by misrepresentation on the part of the defendants in a real estate trade. At the close of the plaintiff's evidence, the trial court directed a verdict for defendants on the theory that the action was barred by the statute of limitations.

The evidence in this case is wholly that on behalf of the plaintiff, and in reviewing the action of the trial court we must regard as conclusively established every point favorable to the unsuccessful party which the evidence tends to establish. *Curtice Co. v. Estate of Jones,* 111 Neb. 166; *Bank of Cortland v. Maxey,* 102 Neb. 20.

With this rule of law definitely in mind, the following statement of facts is delineated: The defendant Arendt was the owner of property in Lincoln, Nebraska, known as the Clayton Apartments, which he traded, with the assistance of defendants Nickles, Douthett, and Pardee, to the plaintiff, a Bohemian farmer, for 80 acres of land in Saline county and a mortgage on other land for $22,000. The mortgage was paid in full and the trade valuation of the land, $14,000, was realized, so that in truth the defendant Arendt received $36,000 for his apartment. The deal was consummated after negotiations between the parties for a period of several weeks, during which time numerous interviews were had between the plaintiff and the defendants, individually and collectively. Nickles, Douthett, and Pardee were real

estate men, to whom the plaintiff paid a commission upon, and as a part of, the consummation of the deal. The defendant Arendt, the owner of the apartment, had a joint office with the other defendants.

The defendants represented to the plaintiff that the apartment cost $42,000 to build and that it was worth more than $36,000. To add color to this representation and to inspire confidence in the plaintiff, he was told that Douthett was the superintendent in construction and knew the cost thereof. Douthett told him many times that the actual cost of the construction of the apartment, plus the cost of and the value of the ground, $18,000, was more than $42,000, and that the value of the apartment was more than $36,000. The apartment, according to the testimony of defendant Douthett, did not cost over $18,000, and the ground was worth only $3,500. It is clearly evident that, as a result of this trade, plaintiff sustained a loss of approximately $14,000. The plaintiff was not interested in the apartment because, as stated in his own words, "I am no good with city property." He was ignorant as to values of city property and knew not how to handle it. But the defendants sustained their contact with him by evincing their interest in assisting him to dispose of certain properties he owned. But they continuously and repeatedly centered his attention upon this particular deal. It was the controlling motif of their activities. The plaintiff, ignorant and inexperienced as to city property, believed and relied upon the representations made to him and closed the deal February 19, 1922. He did not discover the falsity of the representations until about December 8, 1926. This action was started June 22, 1928.

The principal assignment of error is that the trial court erred in finding, as a matter of law, that the plaintiff's cause of action was barred by the statute of limitations, and in directing a verdict for the defendants. Section 8512, Comp. St. 1922, provides that an action for relief on the ground of fraud shall be brought within four years, but the cause of action in such a case shall not be deemed to have

accrued until the discovery of the fraud. This statute has been construed by this court, the leading case being *Parker v. Kuhn,* 21 Neb. 413. There the rule is announced as follows: "An action for relief on the ground of fraud may be commenced at any time within four years after a discovery of the facts constituting the fraud, or of facts sufficient to put a person of ordinary intelligence and prudence on an inquiry, which, if pursued, would lead to such discovery." It cannot be doubted that this is the well-settled rule, since it has been adhered to by this court in an unbroken line of decisions, including among others: *Coad v. Dorsey,* 96 Neb. 612; *Bank of Miller v. Moore,* 81 Neb. 566; *Raymond v. Schriever,* 63 Neb. 719; *Horbach v. Marsh,* 37 Neb. 22; *Wright v. Davis,* 28 Neb. 479.

This transaction occurred February 19, 1922, while this suit was started June 22, 1928. The plaintiff alleges in his petition, and testifies in support thereof, that he first discovered the fraud December 8, 1926, meaning, under our construction of the words of the statute, that he then first discovered the fraud or facts constituting such fraud sufficient to put a person of ordinary intelligence and prudence upon an inquiry, which, if pursued, would have led him to such discovery. The defendants contend that the plaintiff in this case prior to four years from the date of bringing the action discovered such facts. The trial court followed their view. The defendants attribute knowledge to the plaintiff, first, because he went into possession February 23, 1923. The evidence upon this point is that he went into possession, but did not personally manage the apartment, nor collect the rent, but did visit the property a number of times. The plaintiff testifies that he did not discover through his possession of the property any facts constituting fraud. Even his living in the apartment would not necessarily put him in possession of such knowledge. In *Carson v. Greeley,* 107 Neb. 609, where the plaintiff lived on the land for an entire year, this court held that an action brought five years afterward was not barred. The plaintiff here, a Bohemian, was born in Heskov, Hungary, coming

to this country when eight years of age, with little education, and lived upon a farm almost up to the time of this transaction. Paraphrasing the language of Dean, J., in *Carson v. Greeley, supra,* the plaintiff knew nothing about city property; he placed great reliance in defendants, and did not have an understanding of business affairs that would enable him to cope with the defendants. Just as in the last cited case, he was lulled into a feeling of security by the defendants, who continued to represent to him that he had secured a property for less than at cost, and less than it was worth. Some of them secured another trade, which they represented to him as making him a $1,000 profit. This, no doubt, sustained his feeling of security and prevented a suspicion from arising. He was under no duty to have the property appraised until he had knowledge which would put him on inquiry. *Gerner v. Mosher,* 58 Neb. 135; *Raymond v. Schriever,* 63 Neb. 719. In the latter case, Mr. Justice Holcomb said: "The test is not whether the defrauded party has the opportunity or power to discover the fraud, but whether he was in possession of such facts as were sufficient to demand an investigation, which, if pursued, would have disclosed the fraud."

Next it is argued that one Humpe, a real estate man, was his agent for managing the apartment and collecting the rents. Plaintiff asked him to find a buyer, but price was not discussed. This man knew the value of said apartment, but testified that he never told plaintiff, because, as he said, it was none of his affairs. This corroborates the plaintiff's testimony. It is evident that knowledge of facts constituting fraud cannot be imputed to the plaintiff from this circumstance. Particularly is this true since at this time plaintiff would not have believed him as against defendants, as is evidenced by the fact that, when some of the apartments became vacant and Humpe did not immediately lease them, he turned the property over to Douthett to manage.

The final contention of defendants, in this regard, is that on August 2, 1923, he traded with defendants Nickles and Douthett, representing an owner of a hotel in Belgrade,

Nebraska, wherein he traded the apartment for said hotel, and within two weeks thereof discovered that he had been defrauded, and that this transaction should have put him upon inquiry in the former deal. We consider this subsequent transaction only as it bears upon the plaintiff's knowledge of such facts constituting fraud as would start him upon a course of inquiry which would lead him to the ultimate discovery of such fraud. The second deal only included two of the defendants in this case. It was not the same transaction. For the purpose of that trade, his apartment was valued at $36,000. He thought it was worth that and so averred when he brought action on that tort. He testified in that case that this apartment was worth $36,000. It was not until the case was tried, December 8, 1926, when defendant Douthett, and many other real estate men, testified that the value was around $21,500, and not $36,000, that there is any direct evidence that knowledge of the fraud was brought to him. There is no case, as far as we are aware, which holds that a man must be so keenly on the scent of efforts to defraud him that, without knowledge of any fact which would lead a prudent man to suspect he had been defrauded, he is required to make investigations merely because it is in his power to do so. *Raymond v. Schriever*, 63 Neb. 719.

Taking into consideration the evidence upon the question as to plaintiff's knowledge of the facts which should have put a person of ordinary intelligence and prudence on an inquiry, which, if pursued, would lead to a discovery of the fraud, we are of the opinion that it became a question of fact for the jury as to whether or not he was apprised of any fact which imposed upon him the duty to resort to an appraisal of the property. No general rule can be announced covering all cases, but it is a question under all the circumstances of each case for the determination of the jury. *Raymond v. Schriever, supra*; *Carson v. Greeley, supra*; *Comfort v. Robinson*, 155 Mich. 143; *Oleson v. Oleson*, 90 Neb. 738.

The trial court should not direct a verdict of the jury

unless the evidence is so clear upon every point upon which the verdict may depend that reasonable minds cannot come to any other conclusion. *Bank of Cortland v. Maxey,* 102 Neb. 20. The evidence in this case, as examined and discussed herein, is not so clear that reasonable minds could not come to a different conclusion than the trial judge. Whereupon, it follows as a practical conclusion that the trial judge usurped the function and invaded the province of the jury when he determined the question of fact as to the time when the plaintiff in this case discovered facts constituting fraud sufficient to place him upon an inquiry which would lead him to a discovery of the fraud as contemplated by the statute.

Some confusion attended the trial of this case, both on the part of the trial judge and the parties, most of which arose out of the fact that many of the cases decided by our court are in equity, wherein the court determines the fact as well as the law. In a law action to recover damages for fraud, the question as to the time of the discovery of the fraud is a question of fact, and is to be determined, as other questions of fact, by the jury.

We have carefully read the record, have given diligent attention to the briefs and oral arguments, and find no other question necessary for our determination. The court should have submitted the case to the jury, and erred in directing a verdict for defendants. The judgment is reversed and the cause remanded.

REVERSED.

ROSE, J., dissenting.

The decision will permit the jury to find that plaintiff, during a period of four years, did not discover he had been defrauded by false representations of value in a transaction through which he acquired title to an apartment house with the resulting right to rentals therefrom in lieu of former income from the consideration paid by him. The effect of such a finding by a jury will prevent the running of the four-year statute of limitations against an action at law to recover damages for the fraud, assuming fraud was com-

mitted. The law applicable to the facts of this case has been stated as follows:

"If the fraud ought to have been discovered, and would have been if reasonable diligence had been exercised by the plaintiff, the statute will run from the time such discovery ought to have been made." 17 R. C. L. 858, sec. 218; *Wright v. Davis*, 28 Neb. 479.

In my view of the evidence, the exercise of reasonable diligence would, as a matter of law, have resulted in the discovery of the alleged fraud within the statutory period of four years. Definite facts disclosing a reasonable excuse for the failure to discover the truth within four years are wanting. There is nothing in the record to show that plaintiff did not have ordinary intelligence. He accumulated, and for years preserved, a considerable fortune. The plea that he did not discover fraud within four years is at variance with the common impulse of rational men to contemplate the value and earning capacity of their property, when income therefrom is a means of livelihood. Rentals from the apartment house were measures of value. They imparted to plaintiff notice of fraud inducing the purchase for a fraudulent consideration, if fraud were committed. Unavoidable knowledge of facts disclosing fraud is equivalent to a discovery of the fraud. Credulous reliance on the vendor of the apartment house and on the agents who represented him in the making of the sale is no excuse for plaintiff's failure to discover within four years misrepresentations of value in that transaction. The law recognized the competency of plaintiff to testify to the value of his own property when acquired and did not permit him to disregard the promptings of his own senses, his own sources of information and his own right to redress and, by denying knowledge of the fraud, escape the consequences of his own failure to exercise reasonable diligence.

In my view of the record, the decision of the majority delegates to the jury a power committed to the courts alone.

Since the jury are now permitted to prevent the bar of the statute in cases of this kind, I think the purposes of the

legislature in limiting the time in which actions at law for fraud may be commenced will often be defeated and the right to litigate stale claims preserved until witnesses disappear. I agree with the district court that the action is barred on the face of the record.

JOHAN A. ANDERSON ET AL., APPELLANTS, V. FRANK LEHMKUHL, COUNTY CLERK, ET AL., APPELLEES. STATE, EX REL. FIRST FARMERS ELECTRIC DISTRICT, APPELLEE, V. FRANK LEHMKUHL, COUNTY CLERK, ET AL., APPELLANTS.

FILED MARCH 19, 1930. No. 26836.

1. **Appeal**: JUDGMENT ON REHEARING. A judgment of this court, entered after a rehearing seasonably requested and allowed, becomes a final judgment and entirely supersedes the former judgment, which is thereby suspended and vacated and is of no force or effect.
2. **Constitutional Law**: CURATIVE ACT. A curative act is one intended to give legal effect to some past act or transaction which is ineffective because of neglect to comply with some requirement of law. 12 C. J. 1091.
3. ———: LEGAL PROCEEDINGS: IRREGULARITIES. Defects in legal proceedings which are mere irregularities may, in the absence of constitutional limitations, be corrected.
4. ———: ———: VOID STATUTE. Retroactive statutes may legalize unauthorized acts which could have been authorized in the first place, but the legislature has no power to legalize a defective proceeding based on a former act which has been held to be unconstitutional.
5. **Statutes**: UNCONSTITUTIONAL LAW. Courts appear to be divided upon the question as to the extent to which moral obligations may be recognized as arising out of unconstitutional enactments. This court holds that, since an unconstitutional law is void, it imposes no duty and confers no power nor authority upon any one, and no obligation is created which can be enforced by subsequent legislation.
6. ———. "In all cases where a general law can be made applicable, no special law shall be enacted." Const. art. III, sec. 18.

APPEAL from the district court for Saunders county: HARRY D. LANDIS, JUDGE. *Reversed, with directions.*

Peterson & Devoe, Charles H. Slama, Wymer Dressler, Joseph F. Berggren and *C. F. Galloway,* for appellants Anderson and others.

J. H. Barry and *Rose, Wells, Martin & Lane, contra.*

Heard before GOSS, C. J., DEAN, THOMPSON, EBERLY and DAY, JJ., and PAINE, District Judge.

PAINE, District Judge.

Two suits were consolidated by the district court for Saunders county, and both were appealed to this court. In the first suit the district court denied an injunction against the defendants, which had been asked by the plaintiffs. The second suit comes here on appeal from an order of mandamus issued by the district court against the defendants. It is impossible to present the issues involved without giving a statement of the facts in the two cases and then a brief summary of the pleadings.

The First Farmers Electric District of Saunders county was organized under sections 7147-7154, Comp. St. 1922, for the purpose of building an electric line to distribute light and power to the farms within the electric district, and bonds of $30,000 were issued and sold to construct a transmission line of poles and wires within the district, which corporation proposed to buy electricity at wholesale from the municipal plant of the city of Wahoo at the rate of 6 cents per kilowatt, and in turn to sell this electric current to the users living in said district at retail at an increased price of from 9 cents to 14 cents per kilowatt. Said electric district consisted of about 21 sections of farm land running up to the city of Wahoo on all except the west side of said city, and in addition thereto the officers of the light district contracted to sell electric current to the village of Ithaca, which was two miles beyond the boundaries of said electric district, thereby contracting to furnish power and light to users who were residing outside of the electric district. Upon its construction said electric district began to do business and has since continued to function

in spite of continuous litigation, and is now furnishing light and power to its customers. The directors of said electric district assessed and levied taxes against the real and personal property within such district and certified the same to the county clerk of Saunders county, Nebraska, and such levy was spread upon the tax rolls by order of the commissioners of said county against all of the property located within such light district.

Said sections 7147-7154, Comp. St. 1922, as amended by chapter 169, Laws of 1923, were brought before this court in the case of *Elliott v. Wille*, 112 Neb. 78, and an opinion entered, finding the sections as amended were constitutional, and that such distribution of light, heat and power as was contemplated was for a public use as distinguished from a private use, which opinion was filed April 30, 1924, but upon rehearing an opinion was entered October 20, 1924, and reported in 112 Neb. 86, in which the judgment of affirmance was vacated and the judgment of the district court was reversed, for the reason that upon reargument this court decided that, when a legislative act authorized private individuals to create and fix the boundaries of a district for public improvement to be paid for by taxes levied upon the property within the district, and without any provision for determination whether the owner's property had been arbitrarily or unjustly included within the district, this was invalid in that it authorized the taking of private property for a public use without just compensation. The court decided that by such a law the legislature attempted to delegate to private individuals legislative and judicial functions, and that such act violated both the state and federal Constitutions, and this court issued an injunction as prayed for by the plaintiff.

Thereafter an attempt was made by those interested to validate the action originally taken by securing the passage by the legislature of Senate File No. 106, found in chapter 89, Laws 1925, which law, although couched in general terms, applied specifically to the local conditions of the First Farmers Electric District of Saunders county, as it

attempted to validate proceedings had prior to the passage of the law. Section 3, ch. 89, is as follows:

"The provisions of the two preceding sections shall be considered cumulative and supplementary to article VII, chapter 67, Compiled Statutes of Nebraska for 1922."

Under this law the officers of the First Farmers Electric District of Saunders county endeavored to make valid and legal all of the steps which had been taken under the sections which had been declared unconstitutional by this court in the case of *Elliott v. Wille,* 112 Neb. 86. A suit was immediately brought in the district court for Saunders county to enjoin the validation of the purported bonds and contracts of said electric district. This injunction was denied by the district court for Saunders county and appeal taken to this court. The issues were determined in the case of *Swanson v. Dolezal,* 114 Neb. 540, in which it was held that chapter 89, Laws 1925, attempted to cure the defect in the original provisions, and that the act was not a complete act within itself but was dependent upon the provisions of the former act which had been declared void. The effect of this decision was to wipe out all legislation in reference to this particular electric district, for it was enjoined from assessing or levying any taxes against the real or personal property within the boundaries of the district.

Those interested in establishing this First Farmers Electric District again sought relief from the legislature, and Senate File No. 68 was passed by the next legislature and became chapter 106, Laws 1927. This law to establish light and power districts in terms that would apply to the conditions in which the First Farmers Electric District found itself is carefully drawn and clearly shows the attempt of the one drafting the same to avoid the defects in the two former acts of the legislature as well as to come within the law as stated by this court in its two former decisions. The title of said Senate File No. 68 reads as follows:

"An act relating to and defining the powers of heat,

light and power districts where ineffective proceedings for their formation have heretofore been had; to validate and cure the ineffective proceedings heretofore had for their formation, their contracts and obligations, and their bonds heretofore issued and sold; and to declare an emergency."

The appellees urge vigorously that this act was complete in itself and not dependent in any way upon any prior act, admitting, however, that it assumed the existence of certain physical facts which did exist and gave a method by which the physical property of the former district, the name of which was not to be changed, might be acquired and the bonds issued several years before be ratified, confirmed and paid. Appellees base their procedure upon a statement, which was dictum, used by this court in *Swanson v. Dolezal, supra,* reading as follows: "We do not determine that a curative act may not afford relief desired in this case." With the emergency clause, this law, found in chapter 106, Laws 1927, was approved April 16, 1927, and the said electric district endeavored to proceed to validate the $30,000 worth of bonds and to assess and levy taxes to pay the interest thereon, and upon March 6, 1928, the plaintiffs filed their amended petition in the district court for Saunders county against Frank Lehmkuhl, as county clerk, and others, seeking a permanent injunction against the levy of such taxes on the ground that said act was invalid and unconstitutional. The defendants filed a demurrer to the amended petition, which was sustained by the district court, and the plaintiffs thereupon elected to stand on the amended petition, and the district court entered a decree sustaining the demurrer and dismissing the amended petition, and from that decree the plaintiffs prosecute this appeal to this court.

The second suit involved in this decision was filed on September 15, 1928, by the First Farmers Electric District bringing a mandamus suit against Frank Lehmkuhl, the county clerk, and other county officers to require and compel the taxing authorities to levy taxes against the real and

personal property within the electric district. In this suit Gust Swanson and 23 other taxpayers of said electric district filed their petition of intervention upon September 24, 1928, praying that mandamus be denied on the ground that chapter 106, Laws 1927, was unconstitutional, and upon this petition of intervention a trial was had upon October 8, 1928, and the district court entered a decree in favor of the First Farmers Electric District, and upon the motion for a new trial being overruled the defendants and interveners gave notice of this appeal.

Thus, while there are two distinct suits involving different plaintiffs and defendants, yet the injunction suit and the mandamus suit involve identical issues and both rest upon the primary question whether chapter 106, Laws 1927, is a valid act under the Constitution and Laws. For the purpose of determining this important question the two proceedings have been consolidated by agreement of the parties and all of the records and exceptions preserved in one bill of exceptions, and by agreement both of the cases are to be determined in one appeal by this court.

With this summary of the history of former proceedings we will now examine the pleadings filed. In the injunction case the amended petition filed by the plaintiffs alleges many of the facts hereinbefore set out and then charges that it is the purpose of the board of county commissioners and the county clerk and the county treasurer to levy and collect taxes upon the real and personal property in said district to operate said electric light and power district and to pay the principal and interest of the bonds heretofore issued by said district.

The plaintiffs further allege, first, that the said act of the 1927 legislature is unconstitutional and absolutely null and void, because it is special legislation, granting to this electric district exclusive privileges, immunities, and franchises; second, that it violates section 7, art. VIII of the Constitution of Nebraska, in that it uses the taxing power for a purely private or corporate purpose; third, that it violates the same section of the Constitution of Nebraska

because it attempts to make said electric district a municipal corporation and impose taxes for corporate purposes; fourth, that it violates section 3, art. I of the Constitution of Nebraska, and section 1 of the Fourteenth Amendment to the Constitution of the United States, in that it deprives the plaintiffs of equal protection of law and deprives them of their property without due process of law; fifth, that it is null and void for the reason that it makes no provision to give any taxpayer an opportunity to be heard except and unless the taxpayer owns real estate in said district, but that the owners of personal property who are taxpayers thereon have no voice whatever in said organization; sixth, that it is null and void because it grants special benefits to lands within the district, and that the legislature cannot impose taxation upon citizens generally for the purpose of paying for benefits to lands of certain individuals only which are especially benefitted thereby; and, lastly, that it is null and void for the reason that it provides for the original hearing to be had before the county commissioners irrespective of whether a majority or any of said commissioners may be residents and members of the light district and users of current therein and interested in the outcome of the proceedings, and fails to provide for a change of venue or a hearing before some other board in the event that any of the commissioners would be interested in or users of the electric current to be furnished by it, and alleges that one of the commissioners of Saunders county was so interested at the time the Senate File No. 68 was passed and ever since that time.

The amended petition further sets out that Senate File No. 68 was enacted in the hope of curing the defects of prior acts which had been held void by the supreme court in the two former cases herein cited, but alleges the fact to be that no district has ever been legally organized under any law whatsoever; that everything done thereunder is null and void for the reason that since the passage of Senate File No. 68 no petitions have been filed by any one for the organization of the district, no elections have been held,

no opportunity given to vote at any election or otherwise, and that Senate File No. 68 is an attempt to supplement former void statutes and to validate contracts and other obligations which were null and void at the time they were performed and executed, and that the distribution of the electric current by said district is not of a public nature nor business in which the public is interested in any manner in a municipal or governmental capacity. To this amended petition appellees filed a general demurrer.

The second case before us is a mandamus case brought by the state of Nebraska, on the relation of the First Farmers Electric District, against the county officers, praying that they be required to extend the levy as taxes in the sum of $4,000 certified, and proceed to collect the same as taxes against the taxable property in the district. To this petition some 24 taxpayers filed a petition in intervention praying that chapter 106, Laws 1927, be declared unconstitutional, null and void, and that the officers be perpetually enjoined from collecting such taxes. The county attorney filed an answer also praying the court to declare said law unconstitutional. These cases were taken under advisement by the district court and a memorandum opinion filed, from which this appeal is taken.

1. This court appreciates the importance of the issues involved and is mindful of the fact that two opinions affecting the same subject-matter are now in the published reports of this court.

Much stress is laid by the appellees upon expressions found in the first opinion published in the case of *Elliott v. Wille*, 112 Neb. 78. It is claimed by appellees that it is conclusively settled by this opinion that distributing this electricity is a public purpose, and appellees rest other contentions upon this decision. But in the later opinion in the same case, as set out in 112 Neb. 86, such opinion of affirmance was vacated and set aside and the judgment of the district court was reversed.

A judgment of this court, entered after a rehearing, seasonably requested and allowed, becomes a final judgment

and entirely supersedes the former judgment, which is thereby suspended and vacated and is of no force or effect.

2. The many issues presented in the pleadings tempt one to weigh the authorities in support or opposition to each contested claim, but because of the fairly extended statement of the facts and issues involved, while we have given attention to each and every issue presented and every challenge interposed, yet our consideration of only the most material thereof will be set out in this opinion in order not to unduly extend the same.

The court finds that under an act set out in sections 7147-7154, Comp. St. 1922, as amended by chapter 169, Laws 1923, the First Farmers Electric District was organized, its lines built, and bonds of $30,000 issued, and this court in *Elliott v. Wille,* 112 Neb. 86, held that such statutes violated both the state and federal Constitutions because such act permitted the taking of private property for a public purpose without due process of law.

The first curative act endeavoring to validate the outstanding obligations of said district was obtained from the 1925 legislature, and is found in chapter 89, Laws 1925, and upon proper proceedings being taken in the district court for Saunders county this act was brought before this court and an opinion rendered in the case of *Swanson v. Dolezal,* 114 Neb. 540, wherein this court held the first curative act to be expressly supplementary to the original unconstitutional legislation and therefore to be absolutely void; citing decisions from the United States supreme court and from Nebraska as follows:

"An unconstitutional act is not a law; it confers no rights; it imposes no duties; it affords no protection; it creates no office; it is, in legal contemplation, as inoperative as though it had never been passed." *Norton v. Shelby County,* 118 U. S. 425.

"The general rule is that an unconstitutional statute is invalid from its inception, and as ineffectual as though it had never passed." *State v. Several Parcels of Land,* 78 Neb. 703.

In *City of Plattsmouth v. Murphy*, 74 Neb. 749, this court held: "An act of the legislature amendatory of, or supplemental to, an unconstitutional law is unconstitutional and void."

Now there is presented to this court the second curative act, secured from the legislature in a new attempt to validate the obligations of this district, and such act is found in Senate File No. 68, set out in chapter 106, Laws 1927. Let us consider first a provision found in section 1 of this Senate File No. 68, reading as follows:

"The county board shall give to such district the name theretofore adopted and used for the same: Provided nothing in this act shall be construed as authorizing the organization of new districts."

This discloses an effort by special legislation to confirm and ratify acts done years ago under an act declared to be void, and precludes the organization of any other district under this act. This act provides in section 2:

"The bonds of said district heretofore issued and sold for the purpose of constructing a system for the distribution of light, heat and power, and all of its proceedings therefor, and all of the contracts and obligations of said district, with boundaries so fixed and determined by the county board as in section 1 of this act provided, are hereby confirmed and validated, and any defects and irregularities therein, or in the proceedings therefor, are hereby cured, so that said bonds, contracts and obligations shall and they are hereby made and declared to be the valid obligations and rights and properties of said district."

It appears that this is a special and purely local act, applying only to this particular district, and for that reason, if for no other, is in violation of constitutional restrictions. *State v. Scott*, 70 Neb. 685; *State v. Kelso*, 92 Neb. 628.

A curative act is one intended to give legal effect to some past act or transaction which is ineffective because of neglect to comply with some requirement of law. 12 C. J. 1091; *Schamblin v. Means*, 6 Cal. App. 261.

It is generally conceded that the legislature may by a retroactive statute validate acts which are void by reason of informality or because of failure to comply with some technicality. 12 C. J. 1093; *McSurely v. McGrew*, 140 Ia. 163.

3, 4. The appellees, insisting that the present act is a legal curative statute, cite *Gibson v. Sherman County*, 97 Neb. 79, and other cases, but the cases cited do not apply to the facts in this case. Defects in legal proceedings which are mere irregularities may in the absence of constitutional limitations be corrected. Retroactive statutes may legalize unauthorized acts which could have been authorized in the first place, but the legislature has no power to legalize defective proceedings based on a former act which has been held to be unconstitutional. 6 R. C. L. 320.

5. Appellees insist that there is a moral obligation to repay the money borrowed upon the bonds, and that this court should not repudiate these bonds on purely technical grounds but should seek diligently to find a legal ground upon which to validate the bonds. Appellees in support thereof cite the case of *Dawson County v. McNamar*, 10 Neb. 276, but the facts in that case are so entirely different from the case at bar that it cannot be considered a precedent. The courts appear to be divided upon the question as to the extent to which moral obligations may be recognized when arising out of unconstitutional laws. 6 R. C. L. 119. A few courts hold that moral obligations in themselves are sufficient to sustain payment from the public treasury. *United States v. Realty Co.*, 163 U. S. 427. Many other courts take the opposite view. The general rule is that an unconstitutional statute, though having the form and name of law, is in reality no law, but is wholly void, and in legal contemplation is as inoperative as if it had never been passed. Since an unconstitutional law is void, it imposes no duties and confers no power or authority on anyone. It affords protection to no one, and no one is bound to obey it, and no courts are bound to enforce it. A bond or contract which rests on an unconstitutional statute is

void and creates no obligation to be enforced by subsequent legislation.

Senate File No. 68 is primarily for the purpose of passing a curative act which will validate $30,000 worth of bonds which have been issued years ago under laws that have been declared to be void and unconstitutional, and a careful study of it impresses the court with the fact that the present legislation is open to many of the same objections as the former legislation, admitting for the purpose of argument that it has been much more carefully drawn and is a studied attempt to avoid the pitfalls of former legislative acts, while at the same time attempting to validate bonds founded upon legislative acts heretofore declared unconstitutional.

It is the duty of courts to exercise extreme caution in deciding constitutional questions and to avoid passing upon them adversely if possible. But when similar facts are presented to this court for the fourth time, twice in the case of *Elliott v. Wille, supra,* and also in the case of *Swanson v. Dolezal, supra,* and now again in this case, and after several sessions of our legislature have been induced to take action in the matter, it must be definitely, and we trust finally, passed upon by this court.

The court is never limited to the exact letter of the law but should ascertain the purpose and effect of the legislation. Under our laws ample provisions exist for municipal ownership lighting plants, and their growth has met the need in many communities in a very satisfactory manner, while in other places municipal plants have been discontinued. However, in this particular case we believe from the act itself it clearly appears that this enactment is only for this especial location and to inject life into bonds issued heretofore under proceedings declared void.

Appellees cite the case of *Cunningham v. Douglas County,* 104 Neb. 405, where, after the Douglas county courthouse was burned by a mob, a special session of the legislature gave relief by allowing several times the usual taxes to be levied to pay bonds by the device of changing the valuation

of property to its full "market value" in place of "assessed value."

There is an old adage, "Hard cases are the quicksands of the law;" and, also, "Hard cases make poor law." In our judgment this act is a special law and violates section 18, art. III of the Constitution, providing that, "In all other cases where a general law can be made applicable, no special law shall be enacted."

In our opinion the general incorporation laws will permit the organization of a company that will give the relief desired and carry out all obligations of the district, legal as well as moral.

Many electrical transmission and distribution lines have been incorporated under our general incorporation law in Nebraska to carry on similar business, by building lines, issuing bonds and retiring them from their earnings instead of from general taxation, and they do all these things without any attempt to secure any special legislation with power of unlimited taxation.

The court finds that the decision and orders entered by the court below were erroneous, and directs that the mandamus proceedings be dismissed; that a judgment be entered in the injunction case in favor of the appellants as prayed.

REVERSED.

K. JACKMAN, APPELLANT, V. CHARLES MILLER ET AL., APPELLEES.

FILED MARCH 21, 1930. NO. 27030.

1. **Process: SERVICE BY PUBLICATION: AFFIDAVIT.** In an action to foreclose a tax lien on real estate situate in this state, as in this case, where service by publication of notice is sought as to certain necessary defendants, and plaintiff files an affidavit alleging the above facts, and in addition thereto states therein "that, after a diligent investigation, search and inquiry by the paintiff, she is unable to ascertain and does not know the whereabouts or residence if in this state of the above named defendants," such affidavit, if it reflects facts which satisfy the court or judge that

"diligent investigation and inquiry" have been made, is a sufficient compliance with the provisions of section 8584, Comp. St. 1922.

2. ———: ———: ———: HEARING. In such a case, where the truthfulness of the facts alleged in the affidavit for service is challenged by way of a special appearance lodged by the defendants sought to be served, before default is entered or judgment rendered, it becomes necessary for the court or judge to set the matter for hearing on the issue thus raised.

3. ———: SPECIAL APPEARANCE: FINDINGS. Record examined, and found that plaintiff had not made "diligent investigation and inquiry," as by statute required; hence, the trial court was justified in sustaining the special appearance.

APPEAL from the district court for Perkins county: CHARLES E. ELDRED, JUDGE. *Affirmed.*

Perry, Van Pelt & Marti and *E. E. Jackman,* for appellant.

George N. Gibbs, Cordeal, Colfer & Russell, Horth, Cleary & Suhr and *Halligan, Beatty & Halligan, contra.*

Heard before GOSS, C. J., DEAN, GOOD, THOMPSON, EBERLY and DAY, JJ., and PAINE, District Judge.

THOMPSON, J.

In this action, instituted in the district court for Perkins county, plaintiff, appellant, sought to foreclose a tax lien on certain lands in such county, the petition being in usual form. Service was attempted to be had on necessary defendants, appellees, the Millers, the Miners, and the Meisters, by publication of notice, and, in furtherance thereof, plaintiff filed an affidavit praying for such service, which affidavit, among other things, contained a reference to the petition and its purpose, and the further pertinent allegation: "That, after a diligent investigation, search and inquiry by the plaintiff, she is unable to ascertain and does not know the whereabouts or residence if in this state of the above named defendants." It was the claim of plaintiff that such quoted assertion met the demands of section 8584, Comp. St. 1922. An order of the judge authorizing

such publication was afterwards entered in harmony with our statute, and publication had. However, before default or judgment was entered, these above named defendants, respectively, interposed a special appearance challenging the court's jurisdiction over their persons, making no objection to the formal parts of the affidavit, but alleging that the above quoted facts were untrue, and were made for the express purpose of denying to such defendants knowledge of the pendency of the suit; further, that no personal service was had on them, and neither was there constructive service as provided for by law. On the issue thus raised, hearing was had to the court. At the close of the evidence, as we conclude, the court entered judgment sustaining the special appearance, set aside the order for service by publication, and on plaintiff's electing to stand on the service as made, the action was dismissed. Plaintiff appeals.

Is the affidavit such as is contemplated by the statutes providing for service by publication?

Section 8583, Comp. St. 1922, referred to in the aforesaid section 8584, so far as here material, provides: "Service may be made by publication in either of the following cases: * * * Fourth. In actions which relate to, or the subject of which is, real or personal property in this state, where any defendant has or claims a lien or interest actual or contingent therein, or the relief demanded consists wholly or partially in excluding him from any interest therein, and such defendant is a nonresident of the state or a foreign corporation; * * * Sixth. In all actions wherein the subject matter is as described in the first or fourth subdivisions of this section whether the defendant be a resident or nonresident of this state, wherein it is alleged in the petition or other pleading that the plaintiff or person in whose behalf such allegations are made, after diligent investigation and inquiry, is unable to ascertain and does not know the whereabouts if in this state or the residence of persons named or designated as defendants to such action, and when the court in which such action is docketed

or a judge thereof, being satisfied that sufficient investigation has been made, shall make an order in such action directing that service be had upon such defendant or defendants by publication."

Section 8584 provides: "Before service can be made by publication an affidavit must be filed that the case is one of those mentioned in the preceding section (8583), and that the defendant to be served is a nonresident of this state; * * * or that such defendant's whereabouts, if in this state, and residence are unknown to plaintiff or person in whose behalf such affidavit is made."

Considering these sections together, and in connection with the different situations sought to be covered by such sections, and the purpose which must have impelled the legislature to their enactment, we are impressed with the thought that to meet their requirements it was only necessary that the action be one affecting the properties and such interests therein, as are indicated by the context of these sections; and that the affidavit needs but to contain the language of such statute, or its equivalent, as it did in this case, and that by so doing the plaintiff was entitled to an order for service by publication, unless and until a challenge was interposed. The affidavit for publication, as we have seen, covered the provisions of the sixth subdivision of section 8583, hereinbefore quoted, to wit, that the plaintiff, "after diligent investigation and inquiry, is unable to ascertain and does not know the whereabouts if in this state or the residence of persons named or designated as defendants to such action." It is our view that such affidavit sufficiently complied with the statutory requirements, and clothed the court with jurisdiction to enter the order for service by publication, providing the allegations in the affidavit were true.

While we have considered the sufficiency of the affidavit, we have done so merely as illustrative of a question of practice, and as an aid in our further discussion herein, as the plaintiff, appellant, has limited our consideration in his brief, as follows: "There is no proposition of law involved

in this case. The only question involved is one of fact, whether the order sustaining the special appearance is sustained by the evidence."

Considering this submission in connection with the aforesaid sections of our statute, and the evidence, it logically follows: When, either before or after the entry of an order for service by publication, and before default is entered or judgment rendered, an objection is filed by an interested party impugning as untrue the facts alleged in plaintiff's affidavit, as in this case, then it becomes necessary for the court or judge to set the matter for hearing, and determine whether or not the challenged allegations are true. *Welch v. Ayres,* 43 Neb. 326. The legislature must have had in mind the far-reaching provisions of this enactment on property rights, and the grave consequences that would follow a careless or wrongful application thereof. Thus, the provision was inserted requiring "diligent investigation and inquiry," not the former alone, but the latter as well, each of which should be made before such an affidavit is entitled to be filed. As we said in *Armstrong v. Griffith,* 94 Neb. 515: "Where jurisdiction in a tax foreclosure case is sought to be acquired by publication, there should be a strict compliance with the provisions of the statute." Further, we might add that the evidence at the hearing was sufficient to, and did, establish that these challenging defendants were at all times involved herein actual residents of this state, and that diligent investigation and inquiry on the part of plaintiff, if made, would have so disclosed. However, the evidence shows that no such investigation and inquiry were made. Thus, the affidavit was false as to these jurisdictional facts, and, being so, was *prima facie* fraudulent.

Under this record, the trial court was justified in sustaining the special appearance, and its judgment is

AFFIRMED.

GOOD, J., dissenting.

I do not agree to the holding that the record fails to show that plaintiff had made diligent investigation and inquiry

as to the residence and whereabouts of the defendants. In my view, the evidence is sufficient to show that the statute was complied with. As held by the majority opinion, the affidavit was sufficient in form. It satisfied the trial judge. He ordered service to be had upon defendants by publication. Pursuant to the order, the notice was published. It must have been brought to the attention of the defendants, because they made special appearance in court and objected to the jurisdiction on the ground that they had not been personally served with summons, and that the allegations of the affidavit for service by publication were untrue. The only evidence offered by defendants in support of their objections was an affidavit of one who was a brother-in-law of one of the parties. This affidavit was received in evidence over objection. Oral evidence was taken in court on behalf of the plaintiff, and an examination of the testimony of these witnesses convinces me that sufficient search and inquiry were made to justify the making of the affidavit.

In my opinion the special appearance should have been overruled, the judgment of dismissal reversed, and the cause remanded, with leave to defendants to file an answer setting up any defense they may have, and permitting a trial of the cause upon the merits.

A. JACKMAN, APPELLANT, V. PETER C. HANSEN ET AL., APPELLEES.

FILED MARCH 21, 1930. No. 27031.

APPEAL from the district court for Perkins county: CHARLES E. ELDRED, JUDGE. *Affirmed.*

E. E. Jackman and *Perry, Van Pelt & Marti,* for appellant.

George N. Gibbs, Cordeal, Colfer & Russell, Horth, Cleary & Suhr and *Halligan, Beatty & Halligan, contra.*

Heard before GOSS, C. J., DEAN, GOOD, THOMPSON, EBERLY and DAY, JJ., and PAINE, District Judge.

THOMPSON, J.

This is a companion case to *Jackman v. Miller* reported, *ante,* p. 463. By agreement of the parties these two actions were argued and submitted to this court at the same time, with the understanding that our holding in *Jackman v. Miller* should be controlling herein. It, therefore, follows that the judgment of the trial court dismissing the action should be, and is,

AFFIRMED.

GOOD, J., dissenting.

The record in this case is identical with that in *Jackman v. Miller, ante,* p. 463, and for the reasons given in the dissenting opinion in the latter case, I dissent from the judgment of affirmance in this case.

OLE JENSEN V. GOLDIE JENSEN.

FILED MARCH 21, 1930. No. 27110.

1. **Constitutional Law**: "DEBT." In a divorce action, an award or judgment of the court directing one of the parties thereto to pay the other alimony, suit money, and attorney's fees, does not create a "debt," as that word is ordinarily understood, or as is intended by its use in section 20, art. I of the Constitution.
2. **Divorce**: ALIMONY: CONTEMPT. It is a power inherent in the

court to enter such an award or judgment, and to enforce compliance therewith by imprisonment for contempt, if necessary.

3. ———: ———: ———. Such contempt proceeding is predicated upon the award and judgment of the court and the refusal without just cause to comply therewith, and not upon evidence forming the basis of such award or judgment.

4. *Cain v. Miller*, 109 Neb. 441, examined and followed.

ERROR to the district court for Douglas county: HERBERT RHOADES, JUDGE. *Affirmed.*

John M. Berger, for plaintiff in error.

R. C. Hunter and *C. C. Sheppard, contra.*

Heard before GOSS, C. J., DEAN, THOMPSON, EBERLY and DAY, JJ., and CARTER and CHASE, District Judges.

THOMPSON, J.

This is a case where the defendant below, Ole Jensen, plaintiff in error here, was adjudged in contempt of court because of his neglect and refusal to pay the amount of an award for attorney's fees in an action for divorce, as provided in a final decree in such action. The sole assignment of error is, in substance, that the court's finding and judgment contravene section 20, art. I of the Constitution of this state. This section provides: "No person shall be imprisoned for debt in any civil action or mesne or final process, unless in cases of fraud." The question is *stare decisis* in this state. This court has determined, upon the husband's refusal, without just cause, to pay or satisfy an order or judgment for alimony, suit money, and attorney's fees for the benefit of the wife in a divorce action, that the order or judgment may be enforced by contempt proceedings, and that such proceedings do not violate the constitutional provision heretofore quoted. *Cain v. Miller*, 109 Neb. 441. The facts reflected by this record bring the action clearly within our holding in the above cited case. This conclusion is not seriously questioned by plaintiff in error, except it is urged by him that in the divorce action the attorneys for plaintiff and defendant agreed before the

decree was rendered that it should be made a part of such decree that the amount of the attorney's fees should be the sum of $200, and that such agreement made the fee an ordinary debt such as is intended by the use of the word "debt" in the above quoted section of our Constitution.

The agreement, if made, was without force except as an evidential fact to be submitted to the trial court for its consideration in determining the fee to be awarded and made a part of its decree. From this record the claimed agreement was so treated by the trial court. This contempt proceeding is predicated upon the award and judgment of the court and the refusal without just cause on the part of the defendant to comply therewith, and not upon the agreement, if made, or other evidence forming the basis of such award or judgment. Neither the alimony, suit money, nor attorney's fees awarded, is a "debt" in the sense in which that word is ordinarily understood, or as is intended by its use in section 20, art. I of the Constitution. These awards were but means of enforcing the performance of a legal duty owing by the husband to the wife, in which the public has an interest. The power both to enter and to enforce such orders is inherent in the court.

All questions involved herein are so aptly covered in *Cain v. Miller, supra,* as to render further discussion useless.

The assigned error is not well taken. The judgment of the trial court is, therefore,

AFFIRMED.

E. MEYER, APPELLANT, V. ROSENBLATT & SON, APPELLEE.

FILED MARCH 21, 1930. No. 27015.

1. Trial: DIRECTION OF VERDICT. In an action for merchandise sold and delivered, wherein defendant counterclaimed, presenting the issue of plaintiff's oral agreement to repay overpayments, an instruction to find for defendant on proof that defendant made payments relying on plaintiff's agreement to repay any overpayments, *held* erroneous as assuming the existence

of such agreement, this being controverted and presenting an issue for the jury under the evidence.

2. ———: REFUSAL OF INSTRUCTIONS. Where, in an action for merchandise sold and delivered, defendant counterclaimed relying on plaintiff's agreement to repay overpayments, it was error to fail to instruct with reference to issues of account stated, and accord and satisfaction, tendered by plaintiff in his reply, and which were supported by competent evidence, since a party is entitled to instructions on his theory of the case, presented by the pleadings and supported by the evidence.
3. **Voluntary Payment.** Where one has voluntarily, with full knowledge of the facts, paid a disputed demand, which he claimed he did not owe, he cannot ordinarily recover it back on the ground of its invalidity.
4. ———: INSTRUCTIONS. Where plaintiff, suing for merchandise sold and delivered, pleaded in his reply to defendant's counterclaim, based on an alleged agreement to repay overpayments, that the payments were voluntarily made, an instruction that defendant could not recover back money paid under threat of lawsuit, but to find for defendant if he proved that he paid money relying on plaintiff's agreement to repay overpayments and to protect credit, *held* wholly insufficient to present the law as to voluntary payments.

APPEAL from the district court for Douglas county: JAMES M. FITZGERALD, JUDGE. *Reversed.*

Monsky, Katleman & Grodinsky, for appellant.

Brogan, Ellick & Raymond, contra.

Heard before GOSS, C. J., ROSE, GOOD, THOMPSON, EBERLY and DAY, JJ., and LANDIS, District Judge.

LANDIS, District Judge.

Plaintiff below, appellant here, brought this action against defendant, appellee here, for merchandise sold and delivered. Defendant admitted the account sued on in full, but counterclaimed, presenting the issue of oral agreements of plaintiff to refund an aggregate amount of payments, represented by counterclaim, to defendant in event plaintiff did not produce receipts for the merchandise represented by such items, which defendant asserted was not delivered.

Plaintiff in his reply and answer denied the issue pre

sented in the counterclaim, alleged an account stated, accord and satisfaction, and voluntary payments. Verdict was returned for defendant for the difference between the admitted account and counterclaim, judgment entered, and upon overruling of motion for new trial plaintiff appeals.

Instruction No. 4 given by the court on its own motion is as follows: "You are instructed that under the law defendant cannot recover back money, simply because it was paid under threat of a lawsuit; but if you find that defendant has proved by a preponderance of the evidence that the goods in the disputed items were not delivered to defendant by plaintiff, and that defendant paid the money to plaintiff relying upon *the agreement of plaintiff to repay defendant for any payments made by defendant to plaintiff for goods undelivered,* and that such payments by defendant to plaintiff were made to protect defendant's credit and relying upon *plaintiff's agreement to repay defendant for any overpayment,* then you should return a verdict for defendant in such sum as you may find defendant has proved under the above rule." (The italics are ours.)

The pleadings and evidence present an issue on the agreement to repay defendant for any payments made by defendant to plaintiff for goods undelivered. The existence of the agreement was controverted. Under this record the question of the existence of the agreement was a primary issue for the jury to determine from the evidence.

Instruction No. 4 assumes the existence of the controverted agreement. It fails to submit this disputed issue of fact to the jury for determination. Under the rule that an instruction is erroneous which assumes a fact as established, which is material to the case, and as to the existence of which the evidence is conflicting, we must hold that the giving of instruction No. 4 was error. *Chicago, B. & Q. R. Co. v. Anderson,* 38 Neb. 112; *Pratt v. Western Bridge & Construction Co.,* 116 Neb. 553.

The trial court did not instruct the jury with reference to the issues of account stated and accord and satisfaction, which plaintiff tendered in his reply, and which are sup-

ported by competent evidence. This is contrary to the well-settled rule in this state that a party to an action is entitled to have the jury instructed with reference to his theory of the case, when the pleadings present the theory as an issue and it is supported by competent evidence. *Boice v. Palmer*, 55 Neb. 389; *Chicago, R. I. & P. R. Co. v. Buckstaff*, 65 Neb. 334; *Allen v. Rushforth*, 77 Neb. 840.

The issue of voluntary payments was presented by the plaintiff in his reply. There was competent evidence introduced to show that the payments, which were the basis of the counterclaim, were made voluntarily by the defendant to the plaintiff, with knowledge of the facts. Where one has voluntarily, with full knowledge of the facts, paid a disputed demand, which he claimed he did not owe, he cannot ordinarily recover it back on the ground of its invalidity. *Renfrew v. Willis*, 33 Neb. 98; *Weber v. Kirkendall*, 44 Neb. 766. Instruction No. 4, *supra*, is the sole instruction given by the trial court which attempts to reflect plaintiff's issue of voluntary payments. It is quite evident that it does not clearly and adequately present the law as to voluntary payments.

Under the circumstances and proof, as shown by the record, the giving of instruction No. 4, failure to instruct on account stated, accord and satisfaction, and inadequately instructing on voluntary payments, constituted error which was prejudicial to the plaintiff.

We do not deem it necessary to discuss other assignments of error.

For the reasons given, the judgment of the district court is reversed and cause remanded for further proceedings according to law.

REVERSED.

GEORGE KEIM ET AL., APPELLANTS, V. VILLAGE OF BLOOMINGTON, APPELLEE.

FILED MARCH 21, 1930. No. 26916.

1. **Municipal Corporations**: DETACHMENT OF LAND. A decree of the district court finding that justice and equity do not require

detachment of farm land from the boundaries of a municipal corporation will not be set aside unless it is clearly shown that the trial court made "an important mistake of fact, or made an erroneous inference of fact or of law."

2. ———: ———. "This rule applies with peculiar force where the trial judge inspected the premises before rendering judgment." *Chapin v. Village of College View*, 88 Neb. 229.
3. **Judgment**: RES JUDICATA. In a proceeding *in rem*, a final judgment on the merits is an absolute bar to a subsequent proceeding founded upon the same state of facts. Such judgment binds successors in title as well as the original parties.
4. **Evidence** examined, and *held* that since former adjudication no new facts entitling plaintiff to relief are presented.

APPEAL from the district court for Franklin county: J. W. JAMES, JUDGE. *Affirmed.*

J. G. Thompson, for appellants.
George Losey, contra.

Heard before GOSS, C. J., ROSE, GOOD, THOMPSON, EBERLY and DAY, JJ., and THOMSEN, District Judge.

THOMSEN, District Judge.

This action is brought under section 4263, Comp. St. 1922, to detach farm land of the plaintiff from the Village of Bloomington. By detachment, the record shows, plaintiff would save about $18 a year, the amount of village tax he is now required to pay. A similar action was brought by a former owner of the land during 1919, which action terminated on March 25, 1920, by a decree in favor of the village. On the trial of the present case the court found that the action brought by the former owner is an adjudication of the present action; that no new facts entitling plaintiff to a decree were presented; and therefore denied the request of plaintiff.

Examination of the pleadings and findings in the two suits shows the facts to be substantially identical, with the exception, however, that in the present action the defendant pleads, additionally, the former adjudication, and the plaintiff replies that conditions have changed in that, first, the county seat has since been moved from Bloomington to

Franklin (October 26, 1920); and, second, that land adjacent to and north of the plaintiff's land and nearer the village and other land has been detached; so in our inquiry we should concern ourselves *only* with whether in the *proof* these latter facts constitute sufficient ground that justice and equity require detachment.

However, such facts alone *without other evidence* are not enough to warrant a finding that such a material change has been proved as to make the former adjudication ineffective.

The details of how the removal of the county seat has affected the community, if at all, are entirely lacking in evidence. Perhaps two stores less exist in the village at present than in 1920; but the comparative size of those remaining is not shown. The decrease in population, if any, the decrease in number of occupied houses, and the decrease in, and diversion of, trade generally, would all be persuasive matters of inquiry were they present. On that score, therefore, it must be assumed that no change, other than those normally to be expected since the period of depression and common to all towns, has taken place. Certainly it cannot be assumed *without some proof* that the land asked to be detached may not be used for village purposes.

What effect, if any, the detachment of the property immediately adjacent to and north of the plaintiff's property or the detachment of other land could have on the right of the plaintiff to have also his land detached is not clearly shown, except that, it is inferentially argued, the continuity of village control is broken; that property must be contiguous in order to enable the village to lawfully entertain jurisdiction over it. *Bisenius v. City of Randolph*, 82 Neb. 520; *City of Denver v. Coulehan*, 20 Colo. 471, 27 L. R. A. 751; *Vestal v. City of Little Rock*, 54 Ark. 321, 11 L. R. A. 778; *State v. Village of Gilbert*, 107 Minn. 364. The record is not entirely clear whether land immediately adjacent to the plaintiff's land on the east and north thereof is village property. However, the record seems to indicate that the

trial judge, by consent of both parties, inspected the property and, it must be presumed, found it to be contiguous to other village property. The trial judge found that since the former adjudication conditions had not changed; and it is entirely probable that his inspection disclosed facts not in the record and upon which he may have largely based his conclusions. *Chapin v. Village of College View*, 88 Neb. 229.

The evidence shows that a sidewalk runs from the village to the depot past and near to the plaintiff's land; that though the plaintiff's land is located almost a mile from the heart of the village, and about one-fourth mile from the main body of platted property, it receives some village benefit. At least the plaintiff uses the village electricity for lighting purposes. In respect to these considerations no change since 1920 has taken place.

One of the defenses claimed in the action in 1920, and again pleaded in the present action, which the defendant says would make it inequitable to detach the plaintiff's land, is that the right-of-way of the Burlington railroad adjoins and crosses part of the present tract; that on such right-of-way are a depot, elevators, stock yards, coal bins and oil tanks, all on property within the village and subject to taxation and from which the village realizes revenue. It was and is evidently feared that by the detachment of the plaintiff's land the railroad would benefit and the village might lose the revenue derived from taxing the railroad property. On this score the record does not show that conditions have changed since the former adjudication.

The evidence establishes that the land is practically all used for agricultural purposes and that the benefits to the plaintiff by union with the village are but slight. It may seem that on these and other general considerations existing today, as in 1920, the plaintiff should have been entitled to have his land detached. These general merits, however, were adversely adjudicated in the hearing in 1920, and by that adjudication the plaintiff is as much bound as his predecessors in title. *Sorensen v. Sorensen*, 68 Neb. 490; *State v. Broatch*, 68 Neb. 687; *Herpolsheimer v. Acme*

Harvester Co., 83 Neb. 53; *Triska v. Miller*, 86 Neb. 503; 15 R. C. L. 1008, 1028.

In any event, we have held that to entitle the plaintiff to a reversal, in a case of this character, the record must show that the trial court made an important mistake of law or fact. *Michaelson v. Village of Tilden*, 72 Neb. 744; *Gregory v. Village of Franklin*, 77 Neb. 62; *Bisenius v. City of Randolph*, 82 Neb. 520; *Chapin v. Village of College View*, 88 Neb. 229; *MacGowan v. Village of Gibbon*, 94 Neb. 772. The record does not show that such a mistake has been made.

This decision should not, however, deter the village board from consenting to detachment when it becomes apparent that in equity and good conscience conditions require such consent.

In view of the foregoing, the judgment of the district court is

AFFIRMED.

MYRTLE CURNYN, APPELLANT, V. JOHN J. KINNEY: WILLIAM VICTOR ET AL., APPELLEES.

FILED MARCH 28, 1930. No. 26823.

1. **Appeal**: DISMISSAL. The failure to file in the district court a motion for a new trial within three days is not of itself a sufficient reason for dismissing an appeal to the supreme court.
2. ———: TRANSCRIPT. The transcript of the proceedings in the district court imports verity upon appeal and is binding upon the supreme court in determining the date of the final order and the date on which the motion for a new trial was filed.
3. ———: ———. Where the transcript of the proceedings of the district court contains a motion for a new trial without showing that it was not filed within three days, the supreme court will presume upon appeal that it was filed within the time required by law.
4. ———: TIME. The statutory period of three months for the taking of an appeal from the district court begins to run from the date on which the judgment is entered on the court journal.
5. **Municipal Corporations**: POLICE OFFICERS: BONDS. For the faithful performance of official duties a police officer of Omaha is required by law to give a bond to the city as obligee.

6. ———: ———: ———. The statute, providing that "All official bonds shall be obligatory upon the principal and sureties, for the faithful discharge of all duties required by law of such principal, for the use of any persons injured by a breach of the condition of such bonds," is, by construction, a part of the official bond of a police officer, though the city is the only obligee named. Comp. St. 1922, sec. 5048.
7. **Parties.** Under a Nebraska statute, a civil action is maintainable in the name of the real party in interest. Comp. St. 1922, sec. 8525.
8. **Municipal Corporations:** POLICE OFFICERS: ACTION ON BOND. The right of recovery on the bond of a policeman, conditioned upon the faithful performance of his official duties, extends to negligent acts committed by him in the exercise of municipal authority and resulting in personal injury without any fault of the person injured, and the latter may maintain an action on the bond, though it runs to the city as obligee.
9. ———: ———: BONDS: LIABILITY. A policeman in uniform, while operating a police motorcycle on public streets in transporting himself from a place of duty, where he had been directing traffic, to another place of duty at a police substation, during his working hours, is acting officially and is liable on his bond for negligence resulting in a collision with a pedestrian who is thus personally injured without fault on his part.

APPEAL from the district court for Douglas county: HERBERT RHOADES, JUDGE. *Reversed.*

A. M. Morrissey, James H. Hanley and *C. J. Endres,* for appellant.

Crofoot, Fraser, Connolly & Stryker, James T. English and *B. J. Boyle, contra.*

Heard before GOSS, C. J., ROSE, DEAN, GOOD, THOMPSON, EBERLY and DAY, JJ.

ROSE, J.

This is an action to recover damages in the sum of $5,527 for personal injuries. Plaintiff was struck by a motorcycle and injured in Omaha May 4, 1927, while attempting to cross Leavenworth street where it intersects Park avenue. John J. Kinney and William Victor, Omaha policemen, and the surety on their official bonds, the Eagle Indemnity

Company, were sued as defendants. Each bond was payable to the city in the penal sum of $1,000 and conditioned upon the faithful performance of the duties of the policeman. At the time of the collision Kinney was driving the motorcycle and Victor was occupying the seat in a sidecar attachment. Due care on the part of plaintiff and negligence in the operation of the motorcycle were pleaded and copies of the bonds were attached to the petition. The principals and the surety were charged with liability for damages resulting from the alleged negligence.

Kinney and Victor admitted that they were police officers and that plaintiff sustained some accidental injuries at the time and place mentioned in her petition. Otherwise each answer was a general denial.

The surety admitted the execution of the official bonds of Kinney and Victor as policemen and also the collision and resulting injuries to plaintiff, but denied the negligence charged, and pleaded that her own negligence was the cause of the accident; that Kinney and Victor were not at the time acting in any official capacity; that Victor did not have any control over the motorcycle and was not negligent in any particular; that the bonds did not cover liability for negligence resulting in the collision, and that neither principal violated his bond.

At the close of plaintiff's evidence the trial court sustained a motion to direct a verdict in favor of the surety, but the verdict directed was never rendered by the jury and a dismissal as to the surety was not then entered. After Kinney and Victor adduced their evidence on the controverted issues between them and plaintiff, the jury returned a verdict in her favor and against Kinney alone for $1,030.25. There was no finding or judgment against Victor. Kinney did not appeal. From a judgment dismissing the action as to the surety plaintiff appealed.

The surety submitted a motion to the supreme court to dismiss the appeal, one ground being that plaintiff did not file her motion for a new trial within three days. The point is not well taken. Failure to file a motion for a new

trial within three days is not of itself a sufficient reason for dismissing an appeal. The filing of a transcript in the supreme court may confer jurisdiction and present rulings below for review in absence of a motion for a new trial. The transcript imports verity. It is binding on the appellate court and it fails to show that plaintiff did not file her motion for a new trial within three days. In the transcript the first entry relating to the dismissal as to the surety is found in an instruction to the jury April 21, 1928. The motion for a new trial was filed April 24, 1928, or within three days.

Failure to file the transcript in the supreme court within three months from the date of the trial court's dismissal as to the surety is also urged as a ground for the dismissal of the appeal. This position is also untenable. During the trial in the court below, April 20, 1928, the surety made a motion to direct a verdict in its favor. The presiding judge announced from the bench the sustaining of the motion but, as already stated, the jury never rendered the verdict directed. The judgment dismissing the action as to the surety was not entered on the court journal until November 14, 1928. This was the controlling date for the purpose of taking the appeal from the dismissal. Plaintiff filed her transcript in the supreme court November 22, 1928, which was the time required by law. The motion to dismiss the appeal is therefore overruled.

On the merits of the case, plaintiff argues that the dismissal of the action as to the surety was erroneous for the reason that the official bond of Kinney created a liability for damages resulting from his negligence while in the performance of his duties as policeman. On the other hand, the surety contends that a liability of that kind was not within the terms of the bond. On the face of the written instrument itself the city of Omaha is the only obligee. There is no specific provision in the bond itself for the protection of third persons or private individuals. The bond contains a recital that Kinney is a police officer. He obligated himself as such to "faithfully and impartially

perform all his duties as such member of the police department."

There is a line of cases holding that, in absence of statutory authority, a private individual cannot maintain an action on an official bond to a municipality or county as obligee. *Carr v. City of Knoxville*, 144 Tenn. 483, and cases collected in 19 A. L. R. 74, including *Cushing v. Lickert*, 79 Neb. 384. There are also contrary decisions to the effect that such a bond inures to the benefit of a private individual unlawfully injured by a policeman while acting in an official capacity. *City of Cairo v. Sheehan*, 173 Ill. App. 464; *People v. Morgan*, 188 Ill. App. 250; *Scott v. Feilschmidt*, 191 Ia. 347; *Hollister v. Hubbard*, 11 S. Dak. 461; *Town of Lester v. Trail*, 85 W. Va. 386; *State v. United States Fidelity & Guaranty Co.*, 85 W. Va. 720.

In the present instance, however, it is not necessary to follow either of these diverging lines of decisions in determining plaintiff's right to maintain her action against the surety, since there is a statutory grant of that privilege, if Kinney, at the time of the collision, was acting in an official capacity while negligently driving the motorcycle and breaching a condition of his bond. The city of Omaha had power to appoint police officers and require bonds, payable to the city, for the faithful performance of their duties. Comp. St. 1922, secs. 3682, 3489, 5040. Pursuant to an exercise of that power in connection with statutory requirements the bonds in suit were executed. A statute applicable to the bonds of police officers provides:

"All official bonds shall be obligatory upon the principal and sureties, for the faithful discharge of all duties required by law of such principal, for the use of any persons injured by a breach of the condition of such bonds." Comp. St. 1922, sec. 5048.

While the city is the only obligee named in the bonds, the benefits thereof are extended by statute to "any persons injured by a breach of the condition of such bonds." The statutory provision quoted is, by construction, a part of the bond itself, and is binding upon both principal and surety.

Cutler v. Roberts, 7 Neb. 4; *Holt County v. Scott,* 53 Neb. 176; *United States Fidelity & Guaranty Co. v. McLaughlin,* 76 Neb. 307. In a recent case the court said:

"Official bonds are conditioned upon the faithful performance of their duties by public officers, and are given and intended for the benefit of the public, and any person, who is injured by the failure of such officer to comply with the conditions of his bond, may sue thereon in the name of the obligee named therein. By executing such a bond the obligor makes the obligee a trustee for any and all persons who are injuriously affected by the breach of its conditions." *Town of Lester v. Trail,* 85 W. Va. 386.

In Nebraska an action is maintainable in the name of the real party in interest. Comp St. 1922, sec. 8525. The right of recovery on the bond of a policeman, conditioned upon the faithful performance of his official duties, extends to negligent acts committed by him in the exercise of municipal authority and resulting in personal injury without any fault of the person injured. *Fidelity & Casualty Co. v. Boehnlein,* 202 Ky. 601; *American Guaranty Co. v. McNiece,* 111 Ohio St. 532, and cases collected in 39 A. L. R. 1306. On authority and reason, the bond in the case at bar covers the negligent act pleaded in the petition.

Was Kinney at the time of the collision performing duty as a police officer? The evidence tends to prove, and the jury found, that, while operating a motorcycle, he negligently collided with plaintiff in a public street and thus injured her. The surety takes the position that he was then acting in a private capacity while transporting himself from one place of duty to another and that consequently the nonofficial act of negligence, if committed, was not a breach of his official bond. The record contains evidence tending to prove the following facts:

The accident occurred about 6 o'clock in the evening, May 4, 1927. Kinney's regular hours of active service as police officer on that day were from 2 o'clock in the afternoon until 10 o'clock at night. At 4:45 he started on the motorcycle for the intersection at Twentieth street and St.

Mary's avenue. After arriving there he performed traffic duty until 6 o'clock, when he left on the motorcycle for the police substation at Thirty-second street and Woolworth avenue, where further official duties were regularly required of him pursuant to order of the chief of police. The collision occurred on the way to the police substation. Kinney was then in the uniform of a policeman during his regular hours of active service. The motorcycle on which he rode was public property in the police service of Omaha.

Proofs of the facts outlined justify the inference that Kinney was acting in an official capacity while transporting himself between the two places where public duty called him at different hours. The motorcycle was not his property. It belonged to the city. While operating it he was engaged in municipal business. It could only be in legal use at the time for police service. Its use by a police officer for a private purpose during his working hours would have been unauthorized. The public at large, observing a uniformed policeman rushing recklessly along a busy street at a high rate of speed on a motorcycle belonging to the city, would not likely infer he was acting in a private or personal capacity. In a recent case the court of appeals of Kentucky said:

"By all the authorities, an official bond for the faithful performance of official duties covers misfeasance, malfeasance, and nonfeasance, as counsel for appellant concede, but their argument assumes negligence in the operation of a motorcycle by a policeman is none of these. Such an assumption has neither authority nor reason to support it. * * * The whole question here then is, was Hamilton's act in negligently driving the motorcycle against plaintiff done by virtue of his office? Admittedly he was patrolling his beat in the manner and with the means provided by the city to enable him to do so. In driving the motorcycle he was doing precisely what his duties required him to do and what he had no right to do except in the discharge of his official duty. He had neither the right to patrol the beat nor drive the motorcycle except as a policeman and there

is no intimation in either the pleadings or the proof that anything he did (except his negligence) was not done in the discharge of his official duty. He was therefore driving the motorcycle by authority of his office, and it was only because of his negligent performance of his official duty that he struck and injured plaintiff. It necessarily follows that the surety upon his official bond is liable for such negligence upon its covenant that he would well and faithfully discharge his duties as a policeman." *Fidelity & Casualty Co. v. Boehnlein,* 202 Ky. 601; followed in *United States Fidelity & Guaranty Co. v. Samuels,* 116 Ohio St. 586, 53 A. L. R. 36.

The better view seems to be that the evidence was sufficient to prove that Kinney, at the time of the collision, was driving the city's motorcycle by virtue of his office as policeman, and that the trial court erred in the ruling to the contrary. It follows that the dismissal of the action as to the surety is reversed and the cause remanded for a new trial of the issues between plaintiff and the surety on Kinney's bond.

REVERSED.

SAMUEL M. HICKMAN, APPELLEE, V. CHARLES JONES, APPELLANT.

FILED MARCH 28, 1930. No. 26931.

1. **Public Lands:** DESCRIPTION. Where the United States government has caused to be made two or more surveys of its public lands, it may, in disposing of any of them, describe the lands according to any of such surveys.
2. **Evidence:** SURVEYS: MONUMENTS. Public reputation and declarations of early settlers, and even of deceased persons, may be competent to establish the fact that a monument is one marking a corner of a section of land by United States government survey, but may be insufficient to establish that such monument is the southeast corner, rather than the southwest corner, of a particular section.
3. **Judgment as Bar.** A judgment in a prior action between the same parties will not be a bar to a subsequent action, unless it is shown by the record, or by clear and satisfactory evidence, that

the same issue presented in the subsequent action was involved in the prior action.

APPEAL from the district court for Morrill county: EDWARD F. CARTER, JUDGE. *Reversed and dismissed.*

T. F. Neighbors and *Paul H. Eaton,* for appellant.

Mitchell & Gantz, contra.

Heard before GOSS, C. J., ROSE, DEAN, GOOD, THOMPSON, EBERLY and DAY, JJ.

GOOD, J.

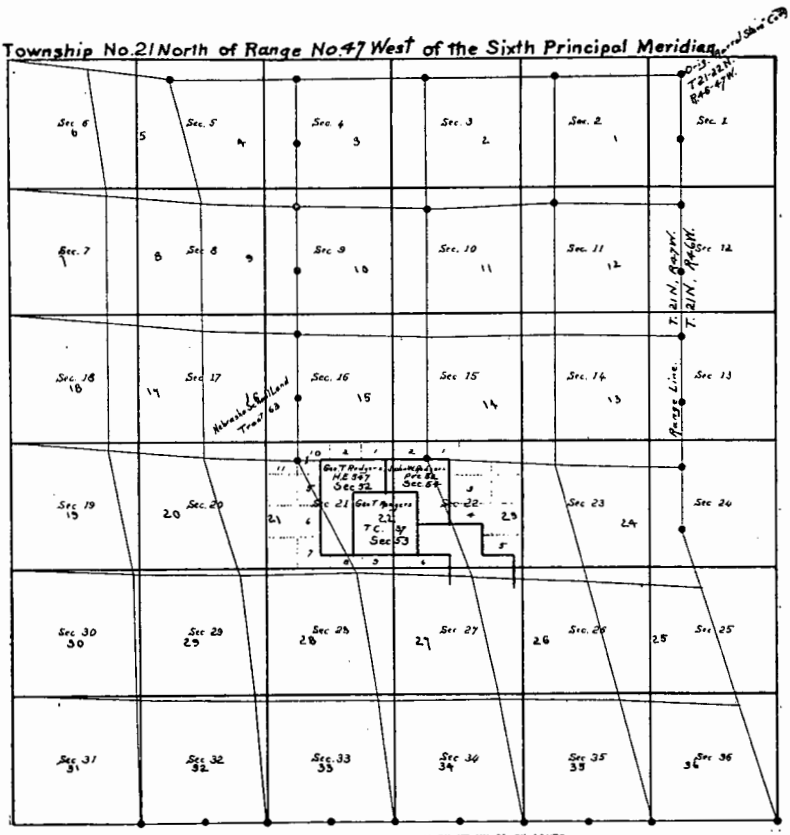
This is an action to quiet title to certain lands in Morrill county, in which plaintiff had decree as prayed, and defendant has appealed.

From the record in this case it appears that plaintiff holds record title in fee simple to the northeast quarter, the east half of the northwest quarter, the northeast quarter of the southwest quarter, and the north half of the southeast quarter of section 21, and the west half of the northwest quarter of section 22, all in township 21 north, range 47 west, according to the original United States government survey. Plaintiff also holds lease from the state of Nebraska to section 16, in said township and range. Defendant holds title by patents from the United States government to the west half of section 15, lots 1 and 2 in section 21, and lots 1 and 2 in section 22, all in township 21 north, range 47 west, according to "the official plat of the survey of the said land, returned to the general land office by the surveyor-general." Plaintiff contends that the lands to which he holds title by deed and lease embrace much of the land claimed by defendant, notwithstanding the latter holds patents from the United States government for the lands to which he asserts title.

The controversy between the parties arises in part from the fact that there were two government surveys of said township which differed materially, and also as to whether a certain monument was the southeast corner of section 16, in said township, according to the original government sur-

vey. The original survey by the United States government was made in about 1879. The plat of that survey was filed in the general land office at Washington, D. C., and a copy thereof filed in the United States land office at Alliance, Nebraska. This plat indicates that said township was rectangular in form and was approximately six miles square. It later developed that said township was not, in fact, six miles square but was irregular in shape, being but five and one-fourth miles from east to west on the north boundary line and six miles from east to west on the south boundary line. The survey was imperfect, and many of the original section corners and quarter-section corners were either not properly marked by monuments or, if so, such monuments had become obliterated. This situation no doubt induced an act of congress in 1899, authorizing and directing a new survey of the township to be made. This survey was made about 1900 by one Alt and was not a retracement of the original but was an independent survey. A plat of this survey was also filed in the general land office and a copy thereof in the United States land office at Alliance. This differed very materially from the original survey. Several years subsequent to the Alt survey the United States government caused to be made a resurvey or retracing of the original government survey, and a plat thereof was filed in the general land office at Washington and a copy thereof in the United States land office at Alliance. On this plat all of the original section corners and quarter-section corners that could be found are indicated. The plat is a true representation of the original survey according to the monuments thereof and indicates the true boundaries of the township, as well as the interior section outlines, at least to all that part of the township where the original government corners were found. We have prepared a plat which shows the original government survey, as retraced, and the Alt survey, one superimposed upon the other. Thereon the original government survey, as retraced, is indicated by light lines, and the Alt survey by heavy lines. The section corners and quarter-section corners of the original survey,

so far as could be found, are indicated upon this plat by the mark "o." Such plat is here reproduced.



THE ALT INDEPENDENT SURVEY SHOWN BY HEAVY BLACK LINES.
THE ORIGINAL U. S. SURVEY SHOWN BY LIGHT BLACK LINES.
ORIGINAL CORNERS INDICATED THUS: ●

The act of congress authorizing the resurvey contained a proviso as follows: "That nothing herein contained shall be so construed as to impair the present *bona fide* claim of any actual occupant of any of said lands so occupied to the amount of land to which, under the law, he is entitled; and provided further, that said resurvey shall in no manner affect the rights of *bona fide* occupants of any of said lands to the land so occupied to the amount which said occupants are entitled to receive from the government."

The general land office issued to Alt special instructions for the execution of the survey and called attention to this provision of the act of congress. The instructions contained, among other things, the following:

"This office understands the 'actual occupant of any of said lands,' to refer to the *present owners* of claims, whether they now occupy and reside on their claims or elsewhere, and that the entire quoted phrase applies to and embraces lands acquired under the timber culture laws or by preemption or homestead entry, and to claims purchased from other parties who may have acquired their title to the lands by any proper legal process. * * *

"*Duties and Authority of Surveyors.* You will properly survey all claims within the townships covered by your contract, in accordance with its provisions and these special instructions. * * * All claims, having boundaries defined by existing corners at their ends, which for the sake of brevity are here designated 'marked boundaries,' will remain unchanged; they will be surveyed as they are marked on the ground, and at least one corner of each claim will be connected by course and distance with the nearest corner of the public surveys, township, section, or quarter-section corner, as the case may be.

"All claim boundaries not marked by natural or artificial corners will be established on true *north and south* or *east and west* lines, in order to simplify cases and limit complications.

"The corners formed by intersection of fences on the boundaries of a claim will be considered corners in the sense the term is herein employed. * * *

"*Claims marked by one corner only.* * * * Survey the boundaries of the claim for area, that is to say, make the boundaries * * * to inclose in rectangular form, the patented area."

There are other elaborate detailed instructions which it is unnecessary to here quote.

When Alt came to make his survey he found one Wagoner, plaintiff's grantor, in possession of certain lands which he claimed by mesne conveyances from the original patent-

ees. The land claimed by Wagoner was the same that plaintiff now claims as being in sections 21 and 22, but did not correspond with the Alt survey. Thereupon, as directed, Alt made a "claim survey" of the lands claimed by Wagoner, and designated the claim survey as sections 52, 53, and 54 upon the plat of the township, as surveyed by him. The original patents for the lands so claimed by Wagoner called for 440 acres. Sections 52, 53, and 54, as surveyed by Alt, likewise embrace 440 acres, so that plaintiff's grantor was, by the Alt survey, accorded the exact number of acres which he claimed, although he was claiming the land under the same designation in sections 21 and 22 as does the plaintiff in this action.

It will be observed, by reference to the foregoing plat, that the north line of sections 52 and 54 is south of the north line of sections 21 and 22, according to the Alt survey. The evidence indicates the distance to be 48 rods. The United States patents, under which defendant claims title to the lands, described as lots 1 and 2 in section 21 and lots 1 and 2 in section 22, adjoin on the north sections 52 and 54, and must have been issued by the United States government with reference to the Alt survey, since there are no lots 1 and 2 in either of said sections, according to the original survey. Where the United States government has caused to be made two or more surveys of its public lands, in disposing of any of them it may describe the lands according to any of such surveys.

In June, 1917, plaintiff acquired from Wagoner title by deed to the lands to which he asserts title in this action. In that deed this land is described in the same manner as asserted by plaintiff in his petition, and contains this further dual description: "But which according to the Alt survey, and embracing the same territory claim-lined by him in A. D. 1900, under contract with the commissioner of the general land office pursuant to an act of congress authorizing the same, and since held by such claim lines and which is designated on the official plat of his survey of said township 21 N. of range 47, as sections * * * 52, 53, and 54," etc. This plainly indicates that plaintiff and his grant-

or both considered the two descriptions identical. It also appears from the record that plaintiff has since placed several mortgages upon the land in which he has given the same dual description of the land; thus showing that he considers sections 52, 53, and 54, according to the Alt survey, as being the identical lands which he claims under descriptions as subdivisions of sections 21 and 22, according to the original government survey. Moreover, plaintiff and his grantor have inclosed the lands, known as sections 52, 53, and 54, on the east, south and west boundaries thereof and a large part of the north boundary. Plaintiff and his grantor have held and possessed these lands in this manner since 1897, and the possession and title have been recognized both by the government and by plaintiff and his grantor as containing 440 acres of land, and it has been recognized that such land is identical with that known and described in the Alt survey as sections 52, 53, and 54. Plaintiff does not assert ownership in fee to more than 440 acres, but he contends that his deeded lands are bordered on the north by section 16 of the original government survey, and that there cannot exist any such lands as represented on the plat of the Alt survey as lots 1 and 2 in section 21 and lots 1 and 2 in section 22. From the evidence it is clear that the north boundary of the land owned by plaintiff in fee simple is the north boundary of sections 52 and 54 of the Alt survey.

A number of witnesses have testified that the point shown on the plat as the southeast corner of section 15 of the original government survey was known and recognized as being the southeast corner of section 16 of that survey. That this monument was a section corner of the original survey is amply proved. That the original entrymen on the lands now embraced in sections 52 and 54 in good faith believed that monument to be the southeast corner of section 16 is made clear from the fact that it was from this corner that they located their lands immediately to the south. They believed the line extending west and east from this monument to be the north line of sections 21 and 22, respectively. They made entry on these lands and described

them as being in sections 21 and 22, and later proved up and received from the United States government patents for lands described as being in those sections. The evidence further shows that this monument is but two miles from the east boundary of the township and that, reckoning a section as being a mile, it is four miles east of the west boundary of the township. It is demonstrated that the monument was, in fact, the southeast corner of section 15, instead of the southeast corner of section 16.

Plaintiff advances the proposition that it is "competent to prove the location of a corner of a public survey by reputation, by the location of land of old settlers, by declaration of deceased persons as to corners and boundaries, by evidence of common repute of the location of public boundary lines and by hearsay testimony." For the sake of argument, the proposition of law may be admitted as sound. But plaintiff argues therefrom that the monument in question must be regarded as the southeast corner of section 16. We think this does not follow. The rule is that such evidence is competent to prove that such a monument is a corner of a public survey, and, while some of the authorities cited may tend to support the contention of plaintiff, the point involved in those cases was whether a certain monument was a corner established by a government survey, and not whether such a monument was the corner of one section or another section. In any event, general reputation among early residents and settlers that a certain monument was a corner of a particular section must give way when it is clearly shown that they were mistaken as to the particular section of which it was a corner.

The evidence in the instant case, that the monument in question was the southeast corner of section 16, was based very largely upon the fact that the original entrymen to the deeded land, now owned by plaintiff, found the monument and reported it to be the southeast corner of section 16, and from that it obtained the reputation of being the southeast corner of section 16. The evidence clearly shows that these entrymen were mistaken, and that the corner in question

was and is the southeast corner of section 15 of the original government survey.

It follows that the deeded land of plaintiff does not embrace any of the land claimed by the defendant, and that defendant is not claiming title or right of possession to any of the land embraced in sections 52, 53, and 54. It is also clear that plaintiff's leasehold interest in section 16 is located one mile west of the corner which he believed was the southeast corner of section 16, and that it does not embrace any of the land for which defendant holds patents. Section 16, as will be observed from the plat contained in this opinion, is designated by the Alt survey as tract 63, and none of the land to which defendant asserts title is included in that section or tract. It is conceded that, in the enabling act for the admission of Nebraska into the Union as a state, the government granted to the state sections 16 and 36 in each township, if such sections had not been otherwise disposed of prior to the admission of the state. The state's title to section 16 rests upon the original government survey. Any subsequent survey by the United States government could not affect or change the title to or boundaries of the land originally granted to the state. It follows that plaintiff was not entitled to a decree quieting title in himself as against the defendant.

Plaintiff has pleaded in his reply that the entire subject-matter has been heretofore adjudicated, and relies on *res judicata* of the controversy herein. In his reply he sets out a copy of the opinion by this court in the case of *Hickman v. Jones,* 106 Neb. 466. The opinion, itself, shows that that was an action in replevin to determine the right of possession to a quantity of hay. The title to lands was not involved nor litigated in that action, notwithstanding reference may have been made thereto in the opinion. Since title to land was not and could not have been litigated in the replevin action, the judgment in that case could not have related to the title to the lands. In fact, the judgment entered in that action is not pleaded, nor does it appear in the evidence.

A judgment in a prior suit between the same parties will not be a bar to a subsequent action unless it is shown by the record, or by clear and satisfactory evidence, that the same issue presented in the subsequent action was involved in the prior suit. *Hamilton Nat. Bank v. American Loan & Trust Co.*, 72 Neb. 81. The plea of *res judicata* is not well taken.

From what has been said, it follows that plaintiff was not entitled to a decree quieting his title as against the defendant. The judgment of the district court is therefore reversed and the action dismissed.

REVERSED AND DISMISSED.

J. W. DILLER, ADMINISTRATOR, APPELLANT, V. CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY, APPELLEE.

FILED MARCH 28, 1930. No. 27013.

1. **Courts.** The decisions of the supreme court of the United States, when applicable, should and must control in determining the issue of negligence where the federal employers' liability act governs. Therefore, its interpretation of the federal employers' liability act must prevail over any state law or rule of interpretation of a state court.
2. **Master and Servant: ACTION FOR DEATH: NEGLIGENCE: PLEADING AND PROOF.** As thus interpreted, it is required in an action against an employer under the federal employers' liability act, for "injury or death resulting in whole or in part from the negligence," or "by reason of any defect or insufficiency," due to the employer's negligence, or for which liability is imposed, some specific neglect, or act of negligence, on the part of the employer, which was a proximate cause of the injury or death complained of, must be alleged and proved.
3. **Evidence** examined, and *held* insufficient to establish negligence on part of the defendant which was a proximate cause of the injury complained of.

APPEAL from the district court for Saline county: ROBERT M. PROUDFIT, JUDGE. *Affirmed.*

Bartos & Placek, for appellant.

Byron Clark, Jesse L. Root, Robert R. Hastings and *J. W. Weingarten, contra.*

Heard before GOSS, C. J., ROSE, GOOD, THOMPSON, EBERLY and DAY, JJ., and LANDIS, DISTRICT JUDGE.

EBERLY, J.

This is an action to recover damages under the terms of the federal employers' liability act providing: "Every common carrier by railroad while engaging in commerce between any of the several states * * * shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or, in case of the death of such employee, to his or her personal representative * * * for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment." 35 U. S. St. at Large, ch. 149, sec. 1, p. 65. At the conclusion of the evidence in the trial court and after both parties had rested, upon motion of the defendant, the jury were instructed to return a verdict for the defendant, and the action was thereupon dismissed. The plaintiff appealed.

The plaintiff's action was necessarily based upon the alleged negligence of the defendant, and as to which the averments of his petition were substantially that the plaintiff's intestate, Samuel Diller, at and prior to the time of contracting the disease causing his death, was the station agent for the defendant, and as such was in charge of the defendant's depot and business at Wilbur, Nebraska; and, with his employer, was engaged in interstate commerce at that point; that the defendant negligently failed to keep and maintain this depot as a reasonably safe place to work, but permitted the same to become in such condition that, due to the flooding thereof, the defective plumbing therein, and the lack of screens at the doors and windows thereof, it was rendered dangerous and exposed the plaintiff's in-

testate, while working, to infection due to the collection and propagation therein of germs causing typhoid fever. These allegations were denied by the defendant, and the evidence on the trial was conflicting on practically all of the issues of fact tendered by plaintiff.

However, in view of the action of the trial court, we are required to accept, for the purposes of this case, the evidence in the record supporting the plaintiff's case as true; and the action of the trial court in this case may be sustained only if the evidence in the record is not sufficient to sustain a verdict for the plaintiff. *Ogden v. Sovereign Camp, W. O. W.*, 84 Neb. 666; *Waxham v. Fink*, 86 Neb. 180; *Meek Co. v. Rohlff*, 91 Neb. 298. Also, in reviewing this cause we are required to assume the existence of every material fact which the evidence on behalf of the plaintiff establishes or tends to prove and give him the benefit of all proper inferences from such facts. *Central Nat. Bank v. Ericson*, 92 Neb. 396.

It is also true that for the sake of uniformity the decisions of the supreme court of the United States should and must control in determining the issue of negligence where the employers' liability act governs. *Kansas City W. R. Co. v. McAdow*, 240 U. S. 51. And in this court: "The federal court interpretation of the federal employers' liability act must prevail over any state law or rule of interpretation of a state court." *Preble v. Union Stock Yards Co.*, 110 Neb. 383. It seems that the federal courts have so construed this act that there is no liability thereunder without proof of the negligence of the defendant which was the proximate cause of the injury complained of. *Nanfito v. Chicago, B. & Q. R. Co.*, 103 Neb. 577. It was incumbent on plaintiff before such recovery could be had to allege and prove, not only the cause which operated to produce the death, but also that said cause had its origin in some specific and particular negligent act of the defendant, for the result of which it was legally liable. *Missouri, K. & T. R. Co. v. Foreman*, 174 Fed. 377; *Seabord Air Line Railway v. Horton*, 233 U. S. 492; *Toledo, St. L. & W. R. Co. v.*

Allen, 276 U. S. 165; *New York Central R. Co. v. Ambrose*, 50 Sup. Ct. Rep. 198.

For the purposes of this review, it stands as though admitted that plaintiff's intestate had been in the employ of the defendant railroad company for some 40 years at the time of his death; that he came to Wilbur as the station agent of the defendant at that place in 1907, and thereafter continued in that employment, and, while he owned his own home, he continually worked at the depot. The depot was a frame structure, one large room, the north room, on solid ground, with tile floor, the south room, on solid foundation and brick floor; the office, baggage room, or express room, was in the center and rested on brick piers with a hollow space underneath the floor; there was a meter pit under the office beneath the ladies' toilet; that the premises gave evidence of the fact that they were infested with rats. In a corner of the office was located the ladies' toilet and a toilet for men, which were built back to back, and toilet connections for both went into the corner of the meter pit and from thence out under the track and across the right of way to the city sewer system. The toilets had a lead connection between the toilets proper and a cast-iron soil pipe. The soil pipe to which connection was thus made ran out under the depot and conveyed the sewage to, and through, a clay tile pipe to the city sewer system. From 1925 to July 24, 1927, these toilets leaked into the meter pit. The contents of the toilets leaked out of the lead connections, and consisted of water, urine and feces. During this time there was considerable trouble with water coming back under the water pipe, which never could be traced to a water leak. This water varied from a clear to stinking water and a slimy mush, which came from a broken sewer pipe on the west side of the depot and smelled like urine and sewage and sometimes was a foot deep. This meter pit was about four by six feet. Its sides were made of brick with mortar joints. There were cracks in the east and southeast corner of the pit wall. This was located directly under the office and varied from a minute crack to about

an inch in width; it was widest about the center and extended the whole length of the wall. The water and refuse, after reaching this pit from the toilets and the sewer, oozed through that crack and went under the office. There always were stenches under the office, smelling like sewage and stagnant water. The plaintiff also alleges that the drainage of Third street and the alley between Third and Fourth streets, during seasons of extraordinary rains, followed the street to the vicinity opposite the depot, and from thence over the curb, across the tracks, over against the west side of the depot, through the rat holes there located, and found its way under the depot; and it was also alleged by plaintiff that these floods carried, with other refuse, typhoid fever germs; that there were several old privies in the alley referred to which were not covered up, and that big crowds attended a dance hall at the head of the alley, and that these people used the privies for stool and urine purposes; that this fecal matter was infected with typhoid germs and was thus carried by the floods to and under the depot in question; that commencing in 1925 and continuing thereafter the deceased had his lunch in the depot; and it is said in the evidence that the deceased never visited around but spent his time in the depot and his home, and the source from which his food was obtained is attempted to be shown.

The deceased began showing symptoms of sickness as early as the first of July, 1927. It clearly appears from the plaintiff's evidence that after that date and continuing to the 24th of July, 1927, he was scarcely able to go back and forth from his work. He experienced loss of appetite, backache, headache, got weaker, had nose bleed, and was troubled with diarrhea. On July 24 he felt compelled to relinquish his work and was placed in bed. In the opinion of all his doctors he was then suffering from a well-developed case of typhoid fever. He was thereafter removed from his home to the hospital at Grand Island, and after some time returned to his home, where he died on the 10th day of August, 1928, having never recovered from the illness which commenced on or about the 1st day of July, 1927.

It is well said in plaintiff's brief that this is purely and simply a question of fact. From the very nature of the case it is necessary that the proof must be circumstantial and that direct and positive evidence is not available. Typhoid fever is communicated only by taking the germs into the human system. Plaintiff's intestate was stricken with this disease about July 1, 1927, and his illness lasted for over a year. But we are unable to accept plaintiff's conclusion that the facts shown in his evidence establish a right of recovery against the defendant. We find nothing in the evidence supporting any inference further than that the plaintiff's intestate contracted the disease during the time he was employed by the defendant in its depot at Wilbur. Whether the infection occurred upon the street as he was passing to and from the place of employment to his home, or in the depot, or whether it occurred as the result of a possible contact with a typhoid carrier during the course of his business for his principal, we have nothing upon which any positive inference can be based. He had been employed at the same place for more than 20 years. No case of typhoid fever had occurred in Wilbur or vicinity since 1913. So far as the record discloses none of the patrons of the depot, and none of his neighbors, ever developed this disease. That the conditions disclosed by the evidence of plaintiff were unsanitary is true, but if we are to accept plaintiff's theory there were also other unsanitary conditions to be found in the nearby open privies and the use to which the alley referred to was devoted; not only were these unsanitary, but according to plaintiff's allegations were actually infested with typhoid fever germs. There is nothing in the evidence which even, as a matter of probability, discloses when, where, or how the actual contact between plaintiff's intestate and the germs of the disease from which he died actually took place. It is to be remembered that unsanitary conditions promote the spread of, but cannot originate, typhoid fever. The germs must be introduced by man and are so introduced. The man who first brings infection to a community may have the fever and not know

what is the matter. He may be recovering from it and still not know, or he may have had it and recovered long before but be a carrier and continue excreting bacilli for years. No typhoid fever existed at Wilbur or was developed among the patrons of this depot either before, during, or after the commencement of the decedent's illness. Indeed, his appears to be the only case of this disease that can be developed in, or was in manner traceable to, this structure. No investigation was made of the depot and surroundings until about the first day of August, 1927. On that date samples of water were taken at the house, depot, and elsewhere. These were all shown to be negative. On August 14 samples of water and mud were taken from the meter pit and from under the depot and delivered for analysis. About two months later additional samples were taken from the meter pit. Still later further samples were taken and on or about the 18th of March, 1928, certain witnesses who testified went to the premises in company with each other and procured samples. It is true that all of these specimens taken on and after August 14, according to these witnesses, disclosed the presence of typhoid fever germs. But in this connection it is to be remembered that from and after the first days of July to July 24, 1927, the evidence in the record fairly reflects the fact that the deceased, though continuing his regular employment in the depot, was a sick man and suffering from the effects of typhoid fever. The natural method of dissemination of this disease is practically agreed to by the experts of both parties to this litigation. From the record before us it is a fair inference that during this period between the first of July, 1927, and the 24th day of July, in the same year, Diller was excreting typhoid fever germs. During that time he suffered from attacks of diarrhea. The use of the toilets in the office, under such circumstances, by him was inevitable. If plaintiff's witnesses are correct as to their leaky condition and defective plumbing, and plaintiff's theory of the distribution of disease germs from toilets to meter pit and from thence over the ground under the depot is to be accepted, it is fair-

ly inferable that this sick man, thus excreting typhoid bacilli in feces and urine, contributed to the filth that found its way into the meter pit and from thence through the crack in the meter pit wall to the ground under the office, and from thence by rats, mice, flies, and other vermin to various parts of the premises, the results of plaintiff's discoveries made after August 1, 1927, are fully accounted for. At least this source of infection, thus clearly established, precludes an affirmative inference that the infected condition existed at and prior to the time plaintiff's intestate contracted the disease that caused his death.

The result thus reached is in strict accord with the facts testified to by plaintiff's witnesses and is not at variance with what may be termed common knowledge of this disease.

Thus, the findings of the Reed board, which was composed of the medical officers of the army, who at the close of the Spanish American War of 1898 made an extended study of the causes of a typhoid epidemic which the troops of that war suffered and which was published to the nation at large, thus becoming common property, determined as a matter of fact that a man (in a military camp) infected with typhoid fever might have scattered the infection in every latrene in the regiment to which he belonged before the disease was recognized in himself.

And again in 1908 an epidemic of 410 cases of typhoid fever occurred in the suburbs of Boston. The infection was traced to a milk dealer who continued his work for a period of two weeks after the onset of typhoid fever of which he later died. These are not cited as determinative precedents, but only illustrative of the deductions made from the testimony actually appearing in this record.

The conclusion is that, as to the depot occupied by Diller engaged in his employment during the three weeks or more while he was a sick man suffering from typhoid fever, the mere existence of typhoid fever germs in any part of the premises so occupied and used and under the depot to which such germs might have been carried by way of the meter

pit affords no evidence that this infected condition obtained prior to Diller's sickness, or that Diller's sickness was in any manner caused thereby.

The plaintiff in this case relied wholly upon circumstantial evidence to sustain his case. To justify recovery under the federal rule, it is required that the evidence introduced establish as a fact that the negligence of the defendant was the proximate cause of the injury complained of. Wherein circumstantial evidence alone is relied upon to furnish the necessary proof, the federal rule appears to be: "Whenever circumstantial evidence is relied upon to prove a fact, the circumstances must be proved, and not themselves presumed. * * * 'In the first place, as the very foundation of indirect evidence is the establishment of one or more facts from which the inference is sought to be made, the law requires that the latter should be established by direct evidence, as if they were the very facts in issue.' * * * The law requires an open, visible connection between the principal and evidentiary facts and the deductions from them, and does not permit a decision to be made on remote inferences. * * * A presumption which the jury is to make is not a circumstance in proof; and it is not, therefore, a legitimate foundation for a presumption. There is no open and visible connection between the fact out of which the first presumption arises and the fact sought to be established by the dependent presumption." *United States v. Ross,* 92 U. S. 281. See *Manning v. Insurance Company,* 100 U. S. 693, 698; *Chicago, M. & St. P. R. Co. v. Coogan,* 271 U. S. 472, 477; *New York Central R. Co. v. Ambrose,* 50 Sup. Ct. Rep. 198.

It follows therefore that the action of the trial court in directing a verdict against the plaintiff is sustained by the record; and the judgment is

AFFIRMED.

EARL J. KEIL, APPELLEE, V. FARMERS IRRIGATION DISTRICT, APPELLANT.

FILED MARCH 28, 1930. No. 27191.

1. **Master and Servant:** AWARD OF COMPENSATION: APPEAL: SUMMONS: AMENDMENT. Where a mistake is made in the date of the return and answer days of a summons issued on appeal from the award of the compensation commissioner, the same may be amended by the district court, even after objections to the jurisdiction of the court are pending based upon that particular defect.
2. ———: ———: ———: SERVICE OF COPY OF PETITION. The provision of section 3062, Comp. St. 1922, requiring the service of "a copy of the petition," is directory merely, and not mandatory in the sense of being essential to jurisdiction of the district court.

APPEAL from the district court for Scotts Bluff county: EDWARD F. CARTER, JUDGE. *Reversed, with directions.*

Raymond & Fitzgerald, for appellant.

Mothersead & York and *Yale H. Cavett, contra.*

HEARD before GOSS, C. J., ROSE, DEAN, GOOD, THOMPSON, EBERLY and DAY, JJ.

EBERLY, J.

This action was originally an appeal to the district court from the award of the compensation commissioner. Special appearance of the plaintiff (employee) was made and sustained in that court, and the defendant's (employer's) appeal to the district court was dismissed by that court without a hearing on the merits. From the order of dismissal the defendant appeals to this court.

It appears from the record that the hearing in this case before the compensation commissioner was determined on the 27th day of March, 1929; that notice of appeal from this award was duly given and the petition in due form was filed in the district court for Scotts Bluff county on the 3d day of April, 1929. On the same day summons was issued by the clerk of the district court, which fixed the 14th day of April, 1929, as the return day and the 9th day

of May, 1929, as the answer day for the employee, and that the sheriff of said county received the writ on the 4th day of April, 1929, and served it on the 12th day of April, 1929; that thereafter on the 8th day of May, 1929, there was filed in said cause a special appearance objecting to the jurisdiction of the district court therein for the following reasons, to wit:

"(1) No proper service of summons hath been had upon this plaintiff on said appeal, in that the purported summons issued in said case on the 3d day of April, 1929, makes the return day therein on the 15th day of April, 1929, instead of the 7th day of April as required by law, and makes the answer day therein on the 9th day of May, 1929, instead of April 14, 1929. (2) No copy of the petition of the defendant, Farmers Irrigation District, on said appeal was served with said summons as by law required."

On the 20th day of June, 1929, the employer, Farmers Irrigation District, by written motion, moved the court to permit and direct the amendment of the summons issued and served herein by correcting the mistake of the clerk by the insertion of the true and correct date for the return of said summons and the insertion of the true and correct date of answer day therein, and to attach a copy of the petition to conform to statute. Thereafter on the 20th day of June the motion of the Farmers Irrigation District to amend the summons issued and served herein was overruled, and the special appearance was sustained and the appeal of the employer thereupon dismissed and alias summons denied. The employer now presents this action on the part of the trial court as error.

This action arises under the Nebraska workmen's compensation law. Under section 3062 of that act, procedure in cases of dispute, so far as pertains to the matter before us, is as follows: "In case either party refuses to accept the recommendations or awards of the compensation commissioner, either party may submit to the district court a verified petition, setting forth the names and residences of the parties and facts relating to the employment at the

time of the injury, the injury in its extent and character, the amount of wages being received at the time of the injury, the knowledge of or notice to the employer of the occurrence of said injury, and such other facts as may be necessary for the information of the court, and also stating the matter or matters in dispute and the contention of the petitioner with reference thereto. Upon the filing of such petition a summons shall issue and be served upon the adverse party, *as in civil causes*, together with a copy of the petition. Return of service shall be made within four days from the issuance of the summons. Within seven days after the return day of such summons the party upon whom the same is served shall file an answer to said petition," etc., and thereupon after compliance with this statute such cause shall be for trial in the district court.

It is also to be noted that the statutory designation of this proceeding in the district court is "an appeal," it being provided by section 3080, Comp. St. 1922, that the award made by the compensation commissioner shall be final, "unless notice of intention to appeal to the district court has been filed with the compensation commissioner within seven days following the date of rendition of the order or award: Provided, that the order and award shall be binding and final, notwithstanding notice of intention to appeal has been filed within the time limit, until the appeal has been perfected and service had upon the opposite party or parties."

With reference to the filing of the statutory notice of appeal with the compensation commissioner, which is not questioned in the instant case, Flansburg, J., in *Mucha v. Morris & Co.*, 105 Neb. 180, says: "The provision for the filing of notice with the compensation commissioner was for the purpose of giving the adverse party knowledge of the appeal. Upon the filing of such notice, no further duty devolved upon the compensation commissioner. The filing of such notice did not affect the award; on the other hand, the award continues to be binding until the appeal is perfected and service had. It is apparent that such notice is for the benefit of the opposing party, and in such cases it is

generally held that the party for whose benefit the provision is made may waive the giving of the formal notice, and that this may be done by a voluntary appearance in the court where the appeal is lodged. * * * It is our opinion that the district court had jurisdiction of the subject of the action, given by statute by the timely filing of the petition for review, and that the voluntary appearance filed in the case conferred upon the court jurisdiction of the person of the defendant." In *Mauck v. Brown*, 59 Neb. 382, 396, quoting section 98, ch. 26, Comp. St. 1899: "The party against whom judgment is rendered in cases tried in the county and district court may appeal to the district or supreme court"—the court held that "appeal" was used in its distinctive and technical sense, and not in a general sense, and the reasoning of that case seems in point in the present case. We cannot therefore accept the contention of the appellee that the proceeding before us is other than an appeal in the distinctive sense of that term, as it comports not only with the terms of the statute considered with reference to their context, but also when considered with reference to the actual proceedings had in the superior courts to which such appeal lies. On this basis the question presented is: Was the action of the district court in refusing permission to make the amendments applied for and dismissing the appeal error?

It must be conceded that the proceedings before us evidence a *bona fide* attempt on part of the litigant to exercise the constitutional right "to be heard in all civil cases in the court of last resort, by appeal, error, or otherwise." The simple mandate of the Constitution is that this right "shall not be denied." So far as the party appealing is concerned, the compensation act under consideration contains but two requirements as to appeals: First, the giving of notice of appeal; and, second, the filing of a prescribed petition within a prescribed time. It seems admitted in the record that these requirements were substantially performed. The terms of this act under consideration impose on the clerk of the district court upon the filing

of such petition, as an official duty, to issue summons in terms as prescribed in the act, which shall be served "as in civil causes, together with a copy of the petition." It must be conceded that the clerk of the district court in the performance of this official duty is not in any manner under the direction or control of the litigant. In the instant case this official erred and failed to comply with the statutory directions relative to the summons he issued, and because thereof the court dismissed the action, and thus in fact denied the right of appeal. Is this act justifiable?

This court is committed to the doctrine that the right of appeal is a substantial one to be sustained if possible, and equitable relief in the form of a new trial will be granted where a suitor without fault or laches on his part is deprived of some essential to review. *Norfolk Packing Co. v. American Ins. Co.*, 116 Neb. 118.

Under the provisions of sections 1, 2, and 5, ch. 47, Laws 1881, entitled "An act providing for an appeal from the decision of the county court in certain matters," prescribing that the county judge shall transmit to the district court a transcript of his proceedings within ten days after an appeal from an order in probate is perfected, it was held that, where a party has within due time done all that is legally required to perfect the appeal, the district court does not lose jurisdiction of the appeal by reason of its being filed six days late. *Drexel v. Reed*, 69 Neb. 468, 65 Neb. 231; *Cheney v. Buckmaster*, 29 Neb. 420. It would seem that to deny the right of appeal in the instant case wholly because of an official error of the clerk of the court when the appellant "has, within due time, done all that is legally required to perfect an appeal" is hardly consistent with the basic principle which the case last above cited proclaims. However, the record in the case presents other matters for our consideration.

The language of the statute involved (Comp. St. 1922, sec. 3062) is already quoted. By its terms, "upon the filing of such petition a summons shall issue and be served upon the adverse party, as in civil causes, together with a copy

of the petition." The reference to the Civil Code is manifest. So far as applicable to the transaction, and not inconsistent with the workmen's compensation act, by the language quoted the terms of this Civil Code must be considered as part of the statute. The word "as" when used in this connection is defined: "Similar to;" "of the same kind;" "in the same manner;" and "in like manner." 5 C. J. 597. The following phrases similar in import to these controlling statutory words have received judicial interpretation. In *Brownfield v. Weicht*, 9 Ind. 394, 396, where in construing a statute providing that a copy of the order of sale and judgment shall be issued, etc., to the sheriff, who shall thereupon proceed to sell the mortgaged premises, or so much thereof as may be necessary to satisfy the judgment, interest, and cost, *as upon execution*, the court said: "It seems to us that the phrase, 'as upon execution,' plainly shows a legislative intention that the law regulating sales on execution should apply to, and in all respects govern, sales under a decree of foreclosure." Also the phrase, "as in other civil actions," was before the supreme court of Indiana in *Cravens v. Chambers*, 55 Ind. 5, and they held that 1 Rev. St. 1876, pp. 142, 147, sec. 20, providing that in voluntary assignment no party aggrieved shall be deprived from having an appeal as in other civil actions, does not give the appeal of itself, but merely provides that nothing in the act contained shall prevent the appeal "as in other civil actions," and therefore whether the appeal lies depends on whether in civil actions the appeal lies in the case.

It is thought that the statutory language under consideration, "as in civil causes," forming a part of section 3062, Comp. St. 1922, is synonymous with and the exact legal equivalent of "as in other civil actions." It is to be remembered that our Civil Code has abolished distinctions between actions at law and suits in equity and in lieu thereof has ordained that there shall be but one form of action which shall be designated "a civil action." Comp. St. 1922, sec. 8503. A civil action is commenced by filing in the of-

fice of the clerk of the proper court a proper petition and causing a summons to issue thereon. Comp. St. 1922, sec. 8567. "An action shall be deemed commenced, * * * as to the defendant, at the date of the summons which is served upon him." Comp. St. 1922, sec. 8523. The requisites of a summons in civil actions is provided for in section 8569, Comp. St. 1922. "Whenever the time for bringing parties into court is not fixed by statute," the time, and the issuance, service, and return of summons, is regulated by sections 8571, 8582. In connection with the Civil Code provisions relative to the issuance and service of summons, and by this court construed as applicable thereto, and indeed as a real part thereof, is section 8656, Comp. St. 1922, a part of the Code of Civil Procedure, providing: "The court may, either before or after judgment, in furtherance of justice, and on such terms as may be proper, amend any * * * process, or proceeding, by adding or striking out the name of any party or by correcting a mistake in the name of the party, or a mistake in any other respect, or by inserting other allegations material to the case. * * * And whenever any proceeding taken by the party fails to conform, in any respect, to the provisions of this Code, the court may permit the same to be made conformable thereto by amendment." Section 8657, Comp. St. 1922, provides: "The court in every stage of an action, must disregard any error or defect in the pleadings or proceedings which does not affect the substantial rights of the adverse party." It seems but logical to state as the conclusion that the words "as in civil causes," as employed in the compensation act, plainly evidence a legislative intent that the provisions of the Code of Civil Procedure relating to summons shall, except when inconsistent with the specific provisions therein, apply to and in all respects govern procedure under the compensation act.

The analysis of the objections sustained by the district court in the present case discloses that they are essentially two; first, that the summons issued and served was defective in that there was a misstatement as to the return and

answer day as fixed by the workmen's compensation act; and, second, that no copy of the petition was served therewith. In view of the statutory provisions quoted, it is considered that the same rule of amendments applicable to actions under the Civil Code is applicable to the present situation. The matter of erroneous answer and return days was before this court in *Barker Co. v. Central West Investment Co.*, 75 Neb. 43, and the rule announced was: "Where a mistake is made in the date of the return and answer days of a summons, the same may be amended by the district court, even after objections to the jurisdiction of the court are pending based upon that particular defect." The reasoning of Letton, C., author of the opinion, is applicable and controlling in this case. It follows therefore that the errors contained in the summons issued and served under the terms of section 3062, Comp. St. 1922, were subject to amendment, and in so far as the errors appearing in such summons are concerned the action of the trial court in denying the application to amend was erroneous.

Was the failure to serve a copy of the petition jurisdictional? The language of section 3080, Comp. St. 1922, does not in express terms so declare. Indeed, by express reference, as we have seen, the compensation act incorporates within itself the provisions of the Civil Code relating to the issuance and service of summons, and thereby adopts these provisions as applicable to, and in all respects governing, its procedure. Under the Civil Code jurisdiction attaches on service and return of summons. There is no other jurisdictional requirement. By reference these Code provisions are embodied in the compensation act and are controlling, unless the added words, "together with a copy of the petition," are inconsistent with the language of the Civil Code. But such is not the case, for they may be construed together and harmonized. The words last quoted then become "directory" in character, at least not mandatory in the sense of jurisdictional. This construction, it seems, would be necessitated by the fact that the entire proceeding, as we have already seen, is appellate in its char-

acter. And it relating to one of the necessary steps to the exercise of a substantial right conferred by the Constitution itself, judicial discretion should be exercised to promote rather than to defeat this end. It would seem therefore that the district court, in sustaining the special appearance and in denying the application to amend, committed reversible error. The judgment is therefore reversed and the cause remanded, with dirctions to permit the amendments applied for.

REVERSED.

IN RE GUARDIANSHIP OF EBBA PETERSON. JOHN A. LINDBLAD, APPELLEE, V. JACOB PETERSON, APPELLANT.

FILED MARCH 28, 1930. No. 27121.

1. **Guardian and Ward:** MINORS: APPOINTMENT OF GUARDIAN: JURISDICTION. Where a mother having restricted custody of her minor child, by virtue of a divorce decree, removes from the county wherein said decree was rendered and where the father of the child continues to reside, the county court of the county of the mother's domicile does not, upon the death of the mother, acquire jurisdiction to appoint a guardian of the person and the estate of the minor under section 1577, Comp. St. 1922, providing for appointment of guardians for minors being residents or inhabitants of the same county, if the father, upon the death of the mother, seeks to exercise his natural right to the custody of his child and challenges the jurisdiction of the court.
2. **Divorce:** CUSTODY OF CHILD. A decree of divorce, which awards the custody of a minor child to the mother with the privilege of visitation reserved to the father, against whom there is no finding of unfitness, does not deprive the father of the natural right to the custody of his child except as against the mother. Upon her death, his right ceases to be affected by said decree, and he is then entitled to the custody of said child against the claim of any person.
3. **Parent and Child:** CUSTODY OF CHILD. A parent who has not voluntarily surrendered the custody and control of his child, or wilfully abandoned the same, cannot be deprived of his child in a contest with a stranger, unless unfitness is affirmatively alleged and proved.

4. **Guardian and Ward: RESIDENCE OF MINOR.** The habitation or residence of a minor child, as contemplated by section 1577, Comp. St. 1922, is by operation of law determined and fixed by that of the parent legally entitled to the custody and control of said child, unless said parent has voluntarily surrendered such right.

APPEAL from the district court for Frontier county: CHARLES E. ELDRED, JUDGE. *Reversed, with directions.*

John J. Ledwith and *Cordeal, Colfer & Russell,* for appellant.

Latham & Schroeder, contra.

HEARD before GOSS, C. J., ROSE, DEAN, GOOD and DAY, JJ., and CARTER and CHASE, District Judges.

DAY, J.

This is an appeal from the judgment of the district court for Frontier county approving and confirming an order of the county court of said county appointing John A. Lindblad guardian of the estate of Ebba Peterson, a minor.

John A. Lindblad filed a petition, July 13, 1928, in the county court of Frontier county praying for his appointment as guardian of the person and estate of Ebba Peterson, his stepdaughter, a minor, aged 15 years. His petition alleged that both he and the minor were residents and inhabitants of said county; that he had married Hanna Peterson, the mother of Ebba, in April, 1926, from which date until the death of the mother, July 5, 1928, she and her minor child Ebba had resided with him in his home in Frontier county; that his wife, the mother of the minor child herein involved, died intestate leaving an estate of which her minor child inherited three-fourths; that the residence of Jacob Peterson, the father of said minor child, is in Lancaster county, Nebraska, but that the father is not a suitable and competent person to be appointed the guardian of the person and the estate of the minor child.

Ebba Peterson, the minor involved herein, filed a duly acknowledged written nomination of Lindblad, her stepfather, and requested his appointment as her guardian.

To all of which the father objected, as follows: "That your objector, Jacob Peterson, is now, and for many years last past has been, a resident of Lancaster county, Nebraska, and that he is the father of said Ebba Peterson, and further that the domicile of the said Ebba Peterson, since the date of the death of her mother, is Lancaster county, Nebraska, and that because of this fact the county court of Frontier county, Nebraska, is without jurisdiction to hear this application or to appoint a guardian for the said Ebba Peterson, a minor."

Upon hearing, the county court overruled the objection to the jurisdiction, made a finding that the minor was a resident and inhabitant of Frontier county, and entered an order appointing appellee as her guardian. Thereafter, the district court, upon appeal, after a hearing upon the same issues, approved and confirmed the order of the county court by a decree as follows:

"Now on this 25th day of May, 1929, the court being duly advised in the premises, finds that the minor child, Ebba Peterson, has been a *bona fide* resident of Frontier county for more than two years, having been removed to that county by her mother, in whose custody she was, about the month of April, 1926, and resided with her mother in that county until the death of her mother in the month of July, 1928, and has since resided in said county; that she is the owner of an interest in real and personal estate; that she has nominated John A. Lindblad, as guardian; that it appears to the court from the evidence that John A. Lindblad is a suitable and competent person to have the guardianship of the person and estate of said minor. It further appears from the record that the only question raised by the objections of Jacob Peterson is a question of jurisdiction. The court finds that the county court of Frontier county had jurisdiction over said minor and of these proceedings. No other or further objection being made by said Jacob Peterson, it is therefore ordered by the court that the proceedings of the county judge of Frontier county, Nebraska, be and they are hereby confirmed and approved."

The sole question of law presented in this court, as in the county and district courts, is whether the Frontier county court had jurisdiction to appoint a guardian of the person and the estate of Ebba Peterson, a minor, 15 years of age. In 1918, Jacob and Hanna Peterson, the parents of Ebba, were divorced in the district court for Lancaster county, where both resided at that time. The decree of divorce provided for the custody of Ebba as follows: "That the education, care, custody and nurture of the minor daughter Ebba is hereby awarded to the plaintiff subject to the right of the defendant to visit said child at all proper times, and subject to the further right of the father to take said child to his own home to visit him and his other children at suitable times and in such manner as shall not interfere with the education and control of said child; and it is further ordered that said child shall be and remain at all times within the jurisdiction of this court."

In April, 1926, Ebba's mother married John A. Lindblad, appellee, and, accompanied by her child Ebba, moved to her husband's home in Frontier county, where on July 5, 1928, she died, intestate, leaving surviving as her sole heirs, appellee, her husband, and Ebba, her minor daughter. Ebba lived with her mother and step-father continuously from June, 1926, until the mother's death, and since that time has remained at her step-father's home in Frontier county. Ebba's father, Jacob Peterson, was a resident of Lancaster county, Nebraska, at the time of the divorce in 1918; at the time of the death of her mother; at the time Lindblad filed his petition in the county court of Frontier county praying for his appointment as Ebba's guardian; and now is a resident of Lancaster county.

The guardianship proceedings in this case were apparently prosecuted under section 1577, Comp. St. 1922, which provides: "The county court in each county, when it shall appear necessary or convenient, may appoint guardians to minors and others, being inhabitants or residents in the same county." The appellant, the father of Ebba Peterson, contends that the county court of Frontier county did not

have jurisdiction to appoint a guardian, for that the domicile of the minor, Elba Peterson, was in Lancaster county, Nebraska, at the time of the divorcement of her parents in 1918. There, also, she was a resident and inhabitant. What effect did the decree of divorce have upon her? In said decree, her custody was given to her mother. As shown by the decree quoted, *supra,* the custody of the mother was a restricted one. It was restricted by, and subject to, the right of the father to visit said child at all proper times; by the right of the father to take the child to visit him and his other children at suitable times. In order that the father might have the benefit of the privileges reserved to him, it was also ordered that the child should be and remain at all times within the jurisdiction of the court. There was no finding in that decree that the father was unfit to have the custody, care, and education of his child. In this state of the record, the decree of divorce merely settled the question of the custody and control of said child as between the father and mother and upon the death of the mother the father became entitled to her custody and control.

This court said in the case of *Clarke v. Lyon,* 82 Neb. 625: "Where a court granting a divorce, without finding the father unfit, temporarily awards the custody of minor children to the mother, such decree does not deprive the father of the natural right to the custody of such children against any person except the mother; and, upon her death, such right ceases to be affected by such award." In explanation thereof the court used the following language: "Her death not only removes the reason for this award of custody, but renders its execution impossible, so that the right of the father to the custody of the children is no longer affected by such decree." Applied to the case at bar, upon the death of Mrs. Lindblad, the father's right to the custody of Ebba Peterson was not affected by the decree of divorce. Upon that occasion the father immediately became entitled to her custody as a natural right, unaffected by the former decree. The step-father and appellee, Lindblad, did not in any sense succeed to the rights or duties

relative to the minor child, which the mother acquired by virtue of said decree against the father. The father, as the surviving parent, has the natural right to the custody of the child. This is fundamental as well as statutory. Comp. St. 1922, sec. 1581. The welfare of the child is paramount, but every presumption is in favor of the competency and suitability of the parents. There is no conflict between the welfare of the child and the right of the parent, but the custody of a minor is to be determined from the facts in each case with a due regard to both. Courts should not, and do not, deprive parents of the custody of their child without good cause. In a contest between a stranger and a parent, the latter is not to be deprived of the custody of the child, unless unfitness is affirmatively alleged and proved. This court has so held in *Norval v. Zinsmaster*, 57 Neb. 158; *Terry v. Johnson*, 73 Neb. 653; *Voboril v. Voboril*, 115 Neb. 615; *Bailey v. Randall*, 16 Neb. 328.

Since the county court of each county has jurisdiction to appoint a guardian to a minor who is an inhabitant or resident in the same county, the gist of this whole case is whether Ebba Peterson was a resident or inhabitant of Frontier county, as contemplated by section 1577, Comp. St. 1922. If she was, the court had jurisdiction, to make appointment complained of herein; if she was neither a resident nor an inhabitant of said county, then the court was without jurisdiction.

The question of residence, within the meaning of the statute, is generally one of intention to be determined from the facts and circumstances of each particular case. The test of residence is: Did one remove from his former residence with an intention to abandon the same, and an intention of acquiring a new residence? Did Ebba Peterson acquire a new residence when she was taken by her mother from Lancaster to Frontier county? It is the general rule that the residence of a minor child is that of its parents. Under section 1581, Comp. St. 1922, the parents are equally entitled to the custody, services, and earnings, and to direct her education. But upon the entry of a divorce de-

cree between the parents, obviously both cannot exercise all the prerogatives belonging to them as parents, and then the court must make some equitable order, having in mind the best interest and welfare of the child. The order made relative thereto is a temporary order (Comp. St. 1922, sec. 1527), and the child and parents in so far as the custody of the minor child is concerned, are subject to the future orders of the district court relative thereto. We are not passing upon the question as to whether or not the divorced mother of a child, having the unrestricted custody, could, by changing her residence, change that of the child. That is not the case here, since the custody of the mother was restricted by the decree of divorce requiring the child to be kept within the jurisdiction of the court and making the custody of said child as between the parents subject to further orders of the court relative thereto. It follows, therefore, that, since the minor was not capable of changing her residence and the mother was deprived the right by the restrictions in the very decree which gave her custody, the residence of Ebba Peterson was not changed from Lancaster county to Frontier county. It then becomes apparent that the jurisdiction of the Frontier county court fails unless Ebba Peterson was an inhabitant of said county. Before her mother's death, the matter of her habitation and residence was a matter within the exclusive jurisdiction of the district court for Lancaster county. The rights and duties of the mother and father were determined by the decree. They were matters subject to further orders of that court. But when the mother, Hanna Peterson Lindblad, died, the decree of divorce between the parties, in so far as it regulated the rights of the custody of the minor child, became a nullity. Immediately thereupon the father became entitled to the custody of his child. By operation of law, her residence and habitation became that of her father. It became his duty as well as his privilege to select a home for her. From the death of the mother on the 5th of July, 1928, the father was entitled to her custody and control, and from said date he was entitled to choose

her place of residence and habitation, by operation of law. He immediately undertook to exercise his parental right, but was thwarted, and the said right was contested by the step-father, by the commencement of this proceeding on July 13, 1928. The court was without jurisdiction in this case, first, because the mother was without authority to change the residence or habitation of the minor, since her custody was restricted by the provisions in the divorce decree relative to visitation of the father and requiring said minor to be kept within the jurisdiction of the court; and secondly, because, on and after the death of the mother the father of said minor had the exclusive right to determine the place of residence and habitation of said minor child, and by affirmative act he has fixed it in Lancaster county.

While the appellee has not assisted us with briefs, we are not unmindful of certain school cases decided by this court wherein these questions are discussed. *Wirsig v. Scott,* 79 Neb. 322; *Mizner v. School District,* 2 Neb. (Unof.) 238; *McNish v. State,* 74 Neb. 261. In each of these cases, the child was living apart from the parents with their consent. The interest of the state in the education of the children was the controlling factor in these cases. Not one of them involved the question of depriving a parent of the custody of his child. In fact, this court in the case of *Wirsig v. Scott, supra,* distinguished them in the following language: "This contention is put upon the ground that the parents are the natural guardians, and that, while living, a guardian cannot be appointed unless the unsuitableness of the parents is adjudicated, and numerous authorities are cited in support of that contention. That rule is applicable where the appointment of a guardian is resisted by the parents, but we know of no rule of law which will prevent the parents from voluntarily surrendering the custody and control of their children to a suitable guardian, if they choose to do so." Under the holdings of this court, we have no doubt but that her residence in Frontier county was sufficient, if with the father's consent, to entitle her to attend the public schools there.

However, we conclude that the Frontier county court did not have jurisdiction to appoint a guardian over the minor in this case, when the jurisdiction of the court was challenged by the father, who was entitled to her custody some time prior to the commencement of these proceedings. In conformance to the foregoing opinion, the objections of the appellant are sustained, the order appointing the appellee guardian of Ebba Peterson is vacated, the judgment of the district court is reversed and the cause remanded to the district court, with directions to certify the same to the county court.

REVERSED.

STATE, EX REL. O. S. SPILLMAN, ATTORNEY GENERAL, V. STATE BANK OF PAPILLION: R. O. BROWNELL, RECEIVER APPELLANT: ALBERT HALPIN, INTERVENER, APPELLEE.

FILED MARCH 28, 1930. No. 26813.

Banks and Banking: INSOLVENCY: NOTICE: ALLOWANCE OF CLAIMS. Section 21, ch. 191, Laws 1923, does not bar the allowance of the claim of a creditor who did not receive the notice to file claims mailed under the provisions of such section and who had no knowledge of the insolvency of the bank until more than six months after the date for filing claims as fixed by the court's order, and the trial court does not abuse its discretion in allowing such a claim, notwithstanding its prior order, any time before final distribution of proceeds.

APPEAL from the district court for Sarpy county: JAMES T. BEGLEY, JUDGE. *Affirmed.*

Crossman, Munger & Barton, for appellant.

Nickerson & Nickerson, contra.

Heard before GOSS, C. J., DEAN, EBERLY and DAY, JJ., and RHOADES, SPEAR and TEWELL, District Judges.

TEWELL, District Judge.

This cause comes to this court upon appeal by the receiver of the State Bank of Papillion, Nebraska, from an order of the district court allowing the claim of the inter-

vener, Albert Halpin, against the insolvent bank as a deposit, and directing its payment by order upon the bank guaranty fund. The facts are established either by admissions in the pleadings or by the stipulation of facts that is incorporated in the bill of exceptions.

The record discloses that on September 4, 1926, R. O. Brownell was by the district court for Sarpy county, Nebraska, duly appointed receiver of the State Bank of Papillion, hereinafter designated as the bank. On September 15, 1926, the receiver filed in the district court for Sarpy county, Nebraska, that being the county in which the bank was located, a petition designated as "Mailing List of Creditors of State Bank of Papillion." It appears that in this petition the intervener, Albert Halpin, was designated as a creditor, but that his address was not given, the entry therein being "Halpin, Albert, address unknown." On September 16, 1926, an order of the district court for Sarpy county was made and entered of record limiting the time for filing of claims against the bank to November 15, 1926, and fixing the date for a hearing on such claims as December 15, 1926. On September 20, 1926, the receiver furnished the newspaper designated by order of court a notice to creditors, and the same was by it published once each week for two weeks. This notice to creditors was posted on the door of the bank on September 16, 1926. The address of Albert Halpin was not known to the receiver, and on September 22, 1926, the receiver mailed a notice of the time and place of hearing on claims with a blank form for filing of claim, addressed to "Albert Halpin, Papillion, Nebr." The envelope containing this notice and form was returned to the receiver bearing the stamp "Address unknown." The record further shows that the intervener, Halpin, deposited in the bank on September 9, 1925, the sum of $438.33, and that at the time the receiver took charge of the bank he had on deposit in a checking account the sum of $378.33. Shortly after making the deposit mentioned, the intervener left Papillion, and worked in Iowa as a farm hand. He knew nothing about the bank being in

the hands of a receiver until in September, 1927. On September 30, 1927, for the first time he filed his claim, and on October 8, 1927, with leave of court granted by an order of October 8, 1927, without notice to the receiver, he filed his petition of intervention praying for the allowance of his claim and for an order directing that it be paid by order upon the guaranty fund. The proceeds from the assets of the bank had not yet been distributed. In his claim and also in his petition of intervention Halpin pleads the fact that he did not know of the bank being in the hands of a receiver until just before filing his claim, and that no notice to creditors was received by him. The receiver pleads that the allowance of the claim is barred by the provisions of section 21, ch. 191, Laws 1923, upon the theory that such section is a special statute of limitations.

The sole question involved herein is whether or not the trial court erred in allowing Halpin's claim under the facts as above stated. Section 21, ch. 191, Laws 1923, which was in effect, not only when the receiver was appointed, but also when Halpin's claim and petition of intervention were filed, provides as follows:

"Within twenty days after taking possession of any insolvent bank, the receiver shall file in the district court of the county in which the bank is located, a petition setting forth the name and address of each of the creditors of such bank as shown by the books thereof, or known to be creditors by such receiver, and ask for an order limiting the time for filing and fixing the date for hearing on the claims of such creditors. No notice shall be necessary of the hearing on said petition and a judge of said court may hear the same at any time or place within the state at his convenience. Such time for filing claims shall be not more than sixty days nor less than thirty days from the entry of said order, and the date for hearing shall be not more than thirty days thereafter. Within seven days after said order is entered, the receiver shall mail to each known creditor of such bank, a notice of the time, and place of the hearing on claims by the court, and with such notice, shall send a

blank form for filing of claims by the creditor. Such claim shall be sworn to by the creditor or a representative thereof, and filed with the receiver or the clerk of the court. Any claim not presented at the place or within the time fixed by such notice, shall be forever barred unless the court shall by order direct payment thereof thereafter, which order may be entered upon a showing within six months from time fixed by such notice, that the creditor did not have knowledge of the closing of said bank within the time to permit filing of the claim before the date fixed by the court for hearing claims. Such receiver shall also post notice for filing claims on the door of such bank and within three weeks from the date of the order fixing the time for hearing on claims, give notice by publication in such newspaper as the court may direct, once in each week for two weeks, requiring all persons having claims against such bank to obtain forms therefor to verify their claims and present the same to the receiver or to the clerk of the court within the time fixed in such notice."

Intervener Halpin first claims that the provisions of said section were not strictly followed, in that the notice was not mailed to him, but rather simply addressed to him at the town where the bank was located; and, second, claims that such section is contrary to section 1, art. II of the Nebraska Constitution, as being an interference by the legislative with the judicial department of the state, in that it attempts to limit the discretion of the court in its action on claims, rather than to place a bar upon the remedy of the creditor. The following observations relative to said section seem warranted:

(1) The books of the bank determine the name and address of the only persons to be listed as creditors.

(2) Notice to file claims is only mailed to each known creditor.

(3) No diligent search is required to discover unknown creditors, or whereabouts of persons known to be creditors.

(4) There is no provision that the notice in its form shall be directed to any creditor by name.

(5) The only provision for the appearance of the name or address of any creditor as shown by the books of the bank relates to such appearance on a petition to be filed in court and upon an envelope in which the notice is to be mailed.

(6) No time is fixed as to when a notice shall be posted on the door of the bank.

(7) Under the provisions of the act the time for filing claims could elapse prior to the end of the week in which the second publication of the notice was made.

(8) The act contains no provision to the effect that the act of making the deposit shall be a consent to the manner of service of notice to file claims provided by the section in case it is placed in receivership.

(9) The act does not expressly provide an absolute bar to action upon a claim not filed within the time prescribed by the court's order, even to a creditor who actually received the notice, but instead contains the words "unless the court shall by order direct payment thereof thereafter," etc. Such order directing payment "thereafter" could, by the provisions of the section, be made without any claim ever being filed.

(10) There is no provision that the "showing" mentioned therein must be made within six months from any definite time, nor that the court may not direct payment upon some other "showing."

(11) The time within which claims are to be filed is fixed by order of the court in the first instance, and not by the provisions of the section.

The necessity for some special limitation either by statute or court order upon the time within which claims should be filed against an insolvent bank is quite apparent. However, the reasons giving rise to this necessity are different than those that make necessary general statutes of limitations upon actions. The most urgent reason for filing claims within a very limited time against an insolvent bank in a receivership proceeding is that it greatly aids in a quick distribution of the proceeds from the assets, which

could not occur, at least as to the final dividend, until the total of all claims has been ascertained. If all claims against an insolvent bank are filed any time before final distribution of proceeds, the most urgent necessity for such a special limitation is met.

As an aid in determining the intent of the legislature in its passage of said section 21, it is well to state a few rules of law relating to statutes limiting the time in which actions may be brought. The legislature may by statute prescribe a reasonable limitation upon the time within which an action at law or in equity may be brought, and the statute that is in effect at the time the action is brought and applicable thereto is determinative of whether such action is barred, all subject to the restriction that such statute may not limit action on existing claims without allowing a reasonable time within which to bring action thereon. 37 C. J. 687. Such a statute, however, will not be extended by construction to include actions within the reason, but not within the words thereof. 37 C. J. 687-689; *Dringman v. Keith,* 86 Neb. 476; *Helbig v. Citizens Ins. Co.,* 234 Ill. 251. In *State v. Bank of Commerce,* 61 Neb. 22, this court held that a court may, in its discretion, permit a creditor to share in the assets of an insolvent bank, although his claim was not filed within the limit of the time that had been fixed by prior order of court for the presentation of claims. While the said section 21 was not in force at the time of the decision last mentioned, yet the time for presenting claims as fixed by court order had expired under the facts of that case, as is true in this case. See 7 C. J. 744.

With the provisions of said section 21, together with the reasons for its enactment, and also the rules of law above stated, in mind, no conclusion seems warranted in this case other than that the provisions of said section at least do not bar action upon a claim against an insolvent bank of a creditor who did not receive the notice to file claims which the section provides shall be mailed, and that the trial court did not abuse its discretion in allowing the intervener's

claim while the process of liquidation was still in progress and the proceeds from the assets not yet distributed, even though such claim was not filed within the time fixed by a prior general order of the court.

The question of whether or not said section 21 is unconstitutional on account of attempting to place a restriction upon the action of the court, rather than placing a bar upon the remedy of the creditor, as claimed by the intervener, or on account of attempting to bar the claim of the creditor without due process of law, or whether said section is not a special statute of limitations at all, but merely directory in its nature, are questions expressly not decided in this opinion.

For the reasons above stated, the decree of the trial court is affirmed and all costs in this court taxed to appellant.

AFFIRMED.

The following opinion on motion for rehearing was filed October 17, 1930. *Former opinion vacated, and judgment of affirmance adhered to.*

1. **Banks and Banking:** FILING CLAIMS: LIMITATION. Statutory special time limit for filing claims against an insolvent state bank will be applied to bar claims only when it appears that there has been a compliance with the statutory procedure and conditions.
2. **Appeal.** A judgment of the district court will not be reversed unless the record affirmatively shows that prejudicial error was committed.

Heard before GOSS, C. J., ROSE, DEAN, GOOD, THOMPSON, EBERLY and DAY, JJ.

GOOD, J.

From a judgment of the district court, allowing as preferred and payable from the depositors' guaranty fund a claim in favor of Albert Halpin against the State Bank of Papillion, insolvent, the receiver of such bank has appealed.

This cause is now before us on a motion for rehearing. The former opinion appears, *ante*, p. 519.

On September 4, 1926, a receiver for the insolvent bank was appointed, and on the 15th of the same month he filed

in the district court a petition and designated mailing list of creditors of the insolvent bank. On the day following, the district court entered an order limiting the time for filing claims by the creditors of the bank to November 15, 1926, and fixing December 15, 1926, as the date for the hearing on claims. On September 20, 1926, the receiver caused to be published in a Papillion newspaper a notice to creditors, which was published in the issues of September 30 and October 7. On September 16 a copy of the same notice to creditors was posted on the door of the bank.

At the time the receiver was appointed, Halpin, a farmhand, who had worked in the vicinity of Papillion, had on deposit in the State Bank of Papillion the sum of $378.33. This deposit was made in 1925, and some time thereafter Halpin removed to another state, and had no knowledge or information that the bank had become insolvent, or that notice had been given to creditors, until in the month of September, 1927. On the 8th day of October, 1927, he filed his claim with the receiver and asked that it be allowed as preferred. The receiver filed objections to the allowance of the claim, on the ground that, under the provisions of section 21, ch. 191, Laws 1923, and the order of the court fixing the time for filing claims, the claim was barred and could not be allowed.

Section 21, ch. 191, Laws 1923, *inter alia*, provides: "Within twenty days after taking possession of any insolvent bank, the receiver shall file in the district court of the county in which the bank is located, a petition setting forth the name and address of each of the creditors of such bank as shown by the books thereof, or known to be creditors by such receiver, and ask for an order limiting the time for filing and fixing the date for hearing on the claims of such creditors. * * * Such time for filing claims shall be not more than sixty days nor less than thirty days from the entry of said order. * * * Within seven days after said order is entered, the receiver shall mail to each known creditor of such bank a notice of the time, and place of the hearing on claims by the court. * * * Any claim not presented at the place or within the time fixed by such

notice, shall be forever barred unless the court shall by order direct payment thereof thereafter, which order may be entered upon a showing within six months from time fixed by such notice, that the creditor did not have knowledge of the closing of said bank within the time to permit filing of the claim before the date fixed by the court for hearing on claims. Such receiver shall also post notice for filing claims on the door of such bank and within three weeks from the date of the order fixing the time for hearing on claims, give notice by publication in such newspaper as the court may direct, once in each week for two weeks, requiring all persons having claims against such bank to obtain forms therefor to verify their claims and present the same to the receiver or to the clerk of the court within the time fixed in such notice."

The receiver insists that the claim is forever barred, since it was not filed with the receiver or with the clerk of the court until more than six months had elapsed after the time fixed in the order of the court for filing claims.

Assuming, without so deciding, that the statute is valid and should have the interpretation placed upon it by the receiver, we are required to determine whether the facts presented by the record are sufficient to require the application of the time limitation, provided by the statute, to the case in hand. The only evidence preserved in the bill of exceptions is a stipulation by the parties. On this stipulation and the matters therein referred to, the cause was submitted to and decided by the trial court, which overruled the receiver's objections and allowed the claim as preferred.

The stipulation contains the following: "That on September 15, 1926, said R. O. Brownell as such receiver filed with the clerk of the district court of Sarpy county, in which county said insolvent bank was located, a 'petition' and designated 'Mailing List of Creditors of the State Bank of Papillion,' and which is now on file in book 1 of the pleadings in above case No. 4298, and it is stipulated that said 'petition' or 'Mailing List of Creditors of the State Bank of Papillion' be considered as evidence by the court,

together with the verification thereto." The petition and mailing list of creditors, referred to in the stipulation, are not incorporated in the bill of exceptions, nor are they in the record presented to this court. Another excerpt from the stipulation is as follows: "That on September 20, 1926, said receiver furnished the Papillion Times, a legal newspaper printed at Papillion, Nebraska, with a notice to creditors, which notice was published in the issues of said newspaper of September 30 and October 7, 1926. That on September 16, 1926, a copy of said notice to creditors was posted on the door of the State Bank of Papillion. It is also stipulated that the copy of the printed notice shown in Vol. 1 of said case No. 4298 is a correct copy of the notice published and the one posted." The notice therein referred to is not in the bill of exceptions nor in the record. We are not advised by the record as to the grounds or reasons for the court's decision. It is stated in appellant's brief that the trial court did not give the reason or authority upon which the decision was based.

Do these facts, disclosed by the record, require the application of the statute of limitations provided in section 21, ch. 191, Laws 1923? For aught that appears, the trial court may have deemed the petition and mailing list, referred to in the stipulation, insufficient in form and substance to warrant making the order of the court above referred to; or the court may have deemed that the notice to creditors, posted on the door of the bank and published in the newspaper, was insufficient in form and substance to give due notice to creditors, and that it did not comply with the statute. It is apparent that the trial court had before it material evidence on which to base its decision, but which is not preserved in the bill of exceptions. This evidence may have been sufficient to justify the court's action in overruling the receiver's objections and allowing the claim.

We are unable, therefore, to determine that the trial court committed any error in the judgment from which the appeal is taken. It is a well-recognized rule that on appeal, before a cause will be reversed, error must affirma-

tively appear and will not be presumed. Applying this rule to the record before us, we are necessarily compelled to affirm the judgment of the district court.

The conclusion reached renders it unnecessary to consider any of the other questions raised and presented in the briefs and on oral argument.

The former opinion is hereby vacated, and, since no error affirmatively appears, the judgment of affirmance is adhered to.

AFFIRMED.

MAGGIE FISHER, ADMINISTRATRIX, APPELLEE, V. LEWIS H. TRESTER, APPELLANT.

FILED MARCH 28, 1930. No. 26911.

1. **Death**: DAMAGES. In an action by the personal representative of a deceased child, for the benefit of parents, to recover damages for negligently or wrongfully causing the death of such child, the life expectancy of the parents, and not of the child, is to be used as the time element in determining the amount of the damage, where the life expectancy of the child exceeds that of the parents.
2. ———: ———. The measure of damage in an action by the personal representative of a child, for the benefit of its parents, to recover for wrongfully causing the death of such child, is the present worth in money of the contributions having a general monetary value of which the parents are shown by the evidence with reasonable certainty to have been deprived by the act causing the death, and those contributions that are only probable, or conjectural, may not be included in the amount of such damage.
3. ———: ———: INSTRUCTIONS. If the consideration of the life expectancy of one is an issue in an action to recover damage for personal injuries, or wrongful death, the court should instruct the jury to take into account in such consideration, not only mortality tables, if such are in evidence, but also all other facts and circumstances as shown by the evidence and having a bearing thereon.
4. **Appeal**: REMITTITUR. If the jury are led into returning an excessive verdict by reason of erroneous instructions upon the measure of damage, and a given sum can, with certainty, be said to be as much or more than the excess, judgment may be rendered upon such verdict for its amount minus such given

sum, even when the amount of the excess is not definitely ascertainable, if the one in whose favor such verdict was returned voluntarily elects to remit such given sum, and if passion or prejudice did not exist and no error relating to the right of recovery was committed in the trial.

APPEAL from the district court for Lancaster county: WILLARD E. STEWART, JUDGE. *Affirmed on condition.*

Mockett & Finkelstein and *F. B. Baylor,* for appellant.

Chambers & Holland, contra.

Heard before GOSS, C. J., DEAN, GOOD and EBERLY, JJ., and RHOADES, SPEAR and TEWELL, District Judges.

TEWELL, District Judge.

This action was brought by the plaintiff as administratrix of the estate of her deceased son, Harry Fisher, to recover damages arising from the death of said Harry Fisher, which resulted from injuries sustained in an automobile accident. The action is maintained under the provisions of sections 1382 and 1383, Comp. St. 1922, commonly known as Lord Campbell's Act. The accident occurred on March 31, 1928, at the intersection of Thirty-first street and D street in Lincoln, Nebraska. The side of the rear portion of a Ford truck that was being driven westward on Thirty-first street by one John Ernst was struck by the radiator and left front fender of a Ford sedan that was being driven northward on D street by one Albert Wentzlaff, who was then engaged in his work as an employee of the defendant. Ernst, the driver of the truck, and the deceased, Harry Fisher, were employed by Wilson & Company, and, at the time of the accident, were delivering meats and groceries for their employer. At the time the sedan collided with the truck, Harry Fisher was riding in the rear portion of the open body of the truck and sitting upon a pail of lard. He was thrown from the truck by the force of the collision to the pavement, and a day or two later died from the injuries thereby sustained. The petition specifies certain acts of negligence as being the proximate cause of his death.

The answer denies the negligence alleged, and pleads negligence on the part of said Ernst and the deceased. Trial was had to a jury, and from a verdict and judgment for plaintiff in the sum of $7,250 the defendant, Lewis H. Trester, prosecutes this appeal. Wilson & Company was made a party defendant merely because of the subrogation existing in its favor under the employers' liability act, and does not join in the appeal.

In his brief the defendant assigns nine errors. Assignments of error Nos. 2, 3, 4 and 5 are directed respectively against instructions Nos. 12, 13, 16 and 19 given by the court, and assignments of error Nos. 6 and 7 are directed at the refusal of the court to give instructions Nos. 2, 3 and 11 requested by the defendant. These assignments, due to their nature, may be conveniently considered in a group, and for a discussion of them instructions Nos. 12, 13, 16 and 19, as given by the court, are copied herein. These four last mentioned instructions are as follows:

"12. The jury are instructed that in the bringing and prosecution of this action the plaintiff, although she is designated as the administratrix of the estate of Harry Fisher, deceased, is acting only for the next of kin of said Harry Fisher, and the recovery, if any, in her favor must represent only the present worth of the probable monetary loss or services during his lifetime which the father and mother have suffered by reason of the death of Harry Fisher. Therefore, in arriving at the amount of such recovery, if any, you are not to take into consideration the fact that the assets of the estate of said Harry Fisher may have been lessened by reason of his death, or that his father and mother may have suffered some loss of inheritance.

"13. The jury are instructed that no legal obligation rested upon Harry Fisher to make contributions in money or services to his father and mother after he reached the age of twenty-one years, so long as the father and mother are reasonably able to earn a livelihood; and whether such contributions would probably have been made must be determined by you from a preponderance of the evidence."

"16. By present worth is meant that sum which if paid at this time will represent the actual value of those contributions in money or services, if any, which you find Harry Fisher would probably have made to his father and mother had his death not occurred."

"19. If you find from the evidence under the instructions of the court that the defendant, through his agent and servant, was guilty of negligence, as charged in plaintiff's petition, which directly and proximately caused or contributed to the death of plaintiff's decedent, and that plaintiff is entitled to a verdict under the evidence and the instructions given you, then the measure of plaintiff's damages would be the pecuniary loss resulting to decedent's father and mother by reason of decedent's death."

In his assignment of error No. 2, the defendant complains of instruction No. 12, set forth above, as fixing the lifetime of the deceased, and not the lifetime of the next of kin, as the period of time to be used in computing the amount of recovery. It is at least susceptible of this meaning. This instruction is an exact copy of instruction No. 1 of those requested by the defendant, with the exception of the court's addition of the phrase "present worth of the probable" and the phrase "or services during his lifetime" at the points in the instruction where those phrases are placed. The deceased is shown to have been 20 years of age at the time of his death; his mother, Maggie Fisher, to have been 51 years of age, and his father, Emmet E. Fisher, to have been 55 years of age. According to the mortality tables introduced in evidence, the life expectancy of deceased was approximately 40 years; that of his mother approximately 19 years, and that of his father approximately 17 years. Under the inheritance laws of this state, the father and mother of the deceased are his sole next of kin, and share equally all of the avails of any recovery herein under the provisions of section 1383, Comp. St. 1922. The life expectancy of the parents, and not of the child, under the facts in this case, is the life expectancy to be used as the time element in computing the amount of damage. To the extent that instruction No. 12 made the

life expectancy of the deceased the time element in the rule for the computation of damages when the life expectancy of the deceased exceeded that of the parents, it is erroneous. 17 C. J. 1331, and cases cited in the footnotes; *Richmond v. Chicago & W. M. R. Co.*, 87 Mich. 374.

In his said assignments of error Nos. 2 to 5 inclusive, the defendant complains of said instruction No. 12, and also of instructions Nos. 13, 16 and 19, as allowing the amount of contributions by the deceased to depend upon mere probability. In instruction No. 2 requested by the defendant, but not given by the court, the recovery, if any, is limited by the first sentence therein to the present worth of the contributions in money and services that would have been made to the father and mother during their lifetimes. The last sentence in such requested instruction is an exact copy of instruction No. 16 given by the court and set out above, with the exception that the court inserted the word "probably" in its instruction No. 16. The first sentence of instruction No. 11 requested by the defendant, but not given, is an exact copy of instruction No. 13 given by the court and set out above, with the exception that the court added the word "reasonably" and the word "probably" where the same occur in said instruction No. 13. In an action such as this, where the life expectancy of the deceased exceeded that of the next of kin, and the next of kin are the parents of the deceased, the measure of damage is the present worth in money of the contributions having a monetary value of which the preponderance of the evidence shows with reasonable certainty the next of kin have been deprived by the act of the defendant that creates the liability. That which is only probable, estimated or conjectural may not be considered in determining the pecuniary loss. *Burkamp v. Roberts Sanitary Dairy*, 117 Neb. 60; *Greenwood v. King*, 82 Neb. 17; 17 C. J. 1365, and cases cited in the footnotes. Instructions Nos. 12, 13, 16 and 19, when read together, make the probable pecuniary loss, rather than the pecuniary loss shown by the evidence with reasonable certainty, the basis for determin-

ing the pecuniary loss, and to that extent, when instructions free from such interpretation were tendered by the defendant, were erroneous.

Instruction No. 3 requested by the defendant referred to the evidence relating to the age of the next of kin and the mortality tables relating to the probable duration of life of normal persons of that age and directed the jury to take into account their state of health in determining the probable duration of their lives. This instruction was refused by the court and none given upon the subject-matter thereof. The record contains evidence showing the father and mother each to be in a poor state of health. It was the duty of the jury to consider the life expectancy of the parents, not only as shown by the mortality tables, but as shown from all other facts and circumstances shown in the evidence and having a bearing thereon. Such an instruction, indeed, had a proper place in this case and should have been given, although its refusal, if other errors heretofore pointed out had not occurred, might not, perhaps, be said to constitute error. 17 C. J. 1366; *Steinbrunner v. Pittsburgh R. Co.*, 146 Pa. St. 504, 28 Am. St. Rep. 806; *Illinois Central R. Co. v. Houchins*, 121 Ky. 526, 123 Am. St. Rep. 205.

In his assignment of error No. 7, the defendant complains of the court's refusal to give that part of instruction No. 11 requested by him which directs the jury not to consider the evidence relating to the existence of brothers and sisters of the deceased, except so far as it might have a bearing upon the amount of contributions of a monetary value that the deceased would have made to his parents. There is evidence showing that a sister of the deceased, 21 years old and in poor health, lived with the plaintiff and her husband. In assignment of error No. 8, the defendant complains of the admission of evidence showing that two married brothers were living outside the home of their parents. Evidence of this nature in some jurisdictions has been held inadmissible. 17 C. J. 1361. If admitted, the trial court, at least when requested, should give an instruction upon the limited purpose for which

such evidence may be considered. If admitted and a requested instruction thereon properly limiting its purpose is not given, reversible error may be committed, where the record discloses that a part of its effect was to unduly elicit sympathy from the jury. Such does not seem to be the condition in the record in this case.

It will be noted that all of the assignments of error above noted relate to matters having a bearing upon the amount of the recovery, rather than upon the question of whether or not the defendant was liable in damages in some amount. The court submitted the issue of contributory negligence and the circumstances under which it would bar recovery, if existing, to the jury, along with the rule of diminishing the amount of recovery if contributory negligence existed but was slight and the negligence of the defendant gross in comparison therewith. No error is pointed out that relates to liability in some amount. The evidence is sufficient to sustain the plaintiff's right of recovery as distinguished from her amount of recovery.

The only other complaint of the defendant which it is necessary to consider is that which relates to the verdict being excessive. The record shows the deceased to have been attending high school, and intending to enter the state university at Lincoln upon the completion of his high school course. He was industrious, frugal and of good habits. During holidays, summer vacation, and on Saturdays he worked, and earned between $400 and $500 a year. His earnings were given to his mother, who bought the household necessities. After paying for the clothes and incidental expenses of the deceased, the mother claims she had left about one-half of these earnings. He aided his mother about the home. He helped her to do laundry work which she brought home to do for hire from a store where she worked, for doing which his mother was paid the sum of $10 a week. When employed full time while not in school, the deceased earned from $18 to $24 a week. The present worth of $1 on the date of the death of the decedent, if paid once annually for 19 years, that being the

life expectancy of the mother as shown by the mortality tables, is $12.08, when 5 per cent. is used as a basis of computation. Upon the above basis, the pecuniary loss to the parents would have to average the sum of a little more than $600 a year paid each year for the entire period of 19 years in order to be of the present worth of the amount of the verdict in this case. That any rule for the exact mathematical calculation of the pecuniary loss in a case like this exists is not meant nor even inferred by the foregoing statements. Such a rule does not exist, but nevertheless the foregoing method of calculation may permissibly be used by an appellate court as a part of its considration of whether or not the verdict in such a case is excessive. The jury in an action of this kind are necessarily allowed a latitude in determining what pecuniary loss to the next of kin has been shown, but they must confine themselves to such pecuniary loss as is shown by the evidence with reasonable certainty, and cannot arbitrarily indulge in conjecture and speculation. Their action is reviewable within certain limits. 17 C. J. 1347. Upon the record in this case the verdict is excessive.

Although the verdict is excessive, it does not necessarily follow that it must be set aside in its entirety. There is nothing in the record to indicate that it is tainted with passion or prejudice. The errors complained of by the defendant all relate to the amount of the recovery rather than to the right of recovery in some amount. This court has many times affirmed a judgment excessive in amount, even in actions *ex delicto,* upon condition that a remittitur of an amount large enough to include all excess be filed. *Bee Publishing Co. v. World Publishing Co.,* 59 Neb. 713; *Elliott v. City of University Place,* 102 Neb. 273.

Jurisdictions allowing a remittitur in that class of actions *ex delicto* in which the amount of the excess cannot be definitely ascertained seem to confine its allowance to cases in which the errors, if any present, do not relate to the right of recovery, and in which the court can say with reasonable certainty that the amount of the remittitur al-

lowed is large enough to cover all excess. 4 C. J. 1144. In this case the monetary value of the contributions to the next of kin that were being made by the deceased prior to and at the time of his death is confined as to its amount within narrow limits. Of course, such value alone does not measure the pecuniary loss. However, the court can say with reasonable certainty that the sum of $4,250 will include all of the amount by which the verdict is excessive, either by reason of the errors heretofore pointed out, or by reason of the jury having abused their discretion and going even beyond the measure of damage fixed in the instructions as given. Such amount may include more than such excess. If it includes at least all of such excess, no injury is done the defendant, even though the plaintiff elects to remit. If it includes more, neither the plaintiff nor the defendant is injured, as the plaintiff is not required to remit but may accept a new trial instead.

For the reasons above set forth, it is ordered that the judgment of the trial court be reversed and a new trial granted, unless the plaintiff within 30 days after the filing of this opinion file in this court a remittitur of all of the judgment in excess of the sum of $3,000 and interest on such sum of $3,000 accruing since the date such judgment was rendered by the trial court and the costs in the district court; but, in the event such remittitur is filed, that then the judgment of the trial court be affirmed as to the sum of $3,000 and interest thereon after the date such judgment was rendered by the trial court and the costs in the trial court. Costs in this court in any event are taxed to the plaintiff.

AFFIRMED ON CONDITION.

IN RE ESTATE OF IDA WECKER.
HUGO A. WECKER ET AL., APPELLANTS, V. ANNA ZUECHER ET AL., APPELLEES.

FILED APRIL 3, 1930. No. 27098.

Appeal: REVERSAL. The record being examined, *held* that it fails, in the particular shown in the opinion, to furnish a definite

basis to support the decree and judgment of the district court. The judgment is reversed and the cause is remanded for a new trial in accordance with the views expressed in the opinion.

APPEAL from the district court for Pierce county: CHARLES H. STEWART, JUDGE. *Reversed.*

Frederick M. Deutsch and *James E. Brittain,* for appellants.

M. H. Leamy, contra.

Heard before GOSS, C. J., DEAN, THOMPSON, EBERLY and DAY, JJ., and CARTER and CHASE, District Judges.

GOSS, C. J.

This case involves the final distribution of the personal property left by Ida Wecker, who died intestate on November 2, 1926.

The controversy arose in the county court when the estate of Ida Wecker was up for final distribution. The parties in interest are the ten children of Ida Wecker. Four of them were the parties affirmatively interested in the appeal from the final decree of distribution in the county court and they also appealed from an adverse judgment in the district court. The other six children are appellees here as they were satisfied with the decrees in the county and district courts. All of them were represented in both courts. They were and are the only persons interested in the distribution of their mother's estate. They and their mother were the only parties interested in the distribution of their father's estate.

On the trial in the district court most of the facts were stipulated. Nicholas Wecker, the father of these ten children, died June 1, 1915, a resident of Pierce county. His will was probated in that county. It devised 320 acres of land to his son Oswald and devised and bequeathed all the remainder of his property, both real and personal, to his wife for her use during her natural life, without the power to sell the real estate. It devised and bequeathed the remainder in said real and personal property to his daugh-

ters Anna Zuecher, Selma Grunwald, Clara Wecker, Ida Wagner, Lena Huwaldt, and to his son, Oscar Wecker, as tenants in common, share and share alike. Aside from the farm devised to Oswald, the only real property left by Nicholas Wecker was a quarter section of land and two lots in the town of Pierce, all in Pierce county. All debts were paid out of the personal property. The estate of Nicholas Wecker was closed by a final decree and Ida Wecker as executrix was fully discharged on July 7, 1916. She took possession of the said real property given her for her life use and of the personal property remaining. On the trial in the district court the parties stipulated that the personal property, when so taken over by her, was of the value of $18,902.40; and that at the time of her death none of the personal property described in the final decree in the estate of Nicholas Wecker "existed in specie" except a few shares in local companies, separately described in the stipulation and there stipulated as valued at a total of $1,200.

The evidence shows that the total value of the personal property left in the estate of Ida Wecker for expenses of administration and distribution was about $30,000. In the final decree the district court found the amount then on hand to be $29,678.65. Of this sum the judgment allotted $20,831.38 to the six remaindermen under a finding that such sum was the corpus of the estate derived by Ida Wecker from the estate of Nicholas Wecker and preserved by her, and the balance of $8,847.27 was allotted to all her ten heirs as the personal property of Ida Wecker at the time of her death; the decree ordered the expenses of administration to be paid out of the total in proportion to the above allotments.

No evidence has been pointed out to us, nor can we find any ourselves, which indicates the basis for discovery as to the personal property of Ida Wecker in her own right at the time of her husband's death or what she may have acquired at any time thereafter, except perhaps a few hundred dollars worth of wearing apparel and household goods.

The parties expressly stipulated in the evidence during the trial "that, by the terms of the said last will and testament, it was the intention of the said Nicholas Wecker, deceased, to give a life estate in the residue of his property therein referred to to the said Ida Wecker with the power of disposition and sale of the personal property and also the right to consume such portions of the corpus thereof as might be reasonably necessary for her support and maintenance according to her standard of living and station in life."

In effect, the decree finds and holds that Ida Wecker had no personal property at the time of her husband's death; and that she had no personal property in her own right when she died intestate, except the amount of the increase of the personal property, as heretofore stated, taken over here from her husband's estate and left by her to be distributed to all ten heirs share and share alike. As we have indicated, we find no evidence to warrant the assumption that any of the personal property left by her was derived from her husband's estate, except the stocks in the local companies valued at $1,200. The record being silent upon the subject, there was no evidential basis for the decree of the district court that found and held in effect that she had in no way depleted the corpus of the personal property derived from the estate of her husband. For aught the evidence shows, she may have had $30,000 in her own right and may have used all of the personal property derived from her husband's estate, except the stocks heretofore mentioned, in the years between the settlement of his estate and the time of her death. The parties stipulated that she might do this if reasonably necessary, but they have failed to show in evidence that element so essential to arrive at any definite amount, except the $1,200, as the remaining corpus of the personal property derived from her husband's estate. Thus, we cannot say that the $18,902.40, which the parties stipulated as the value of the personal property she took over from her husband's estate, or the $20,831.38, which the district court found and decreed was the true

amount, is the fund which should be paid over, subject to costs and expenses, by her administrator to the six appellees as remaindermen under the will of Nicholas Wecker. Because of this failure of the evidence, the case will have to be sent back to the district court.

We do not desire to embarrass the trial there, or the review here, if perchance the case should come here again. But we deem a few suggestions helpful. The estate of Nicholas Wecker was fully closed and the executrix was discharged. When this controversy arose in the estate of Ida Wecker, intestate, in the county court, there are some things to indicate that perhaps the county court appointed as administrator *de bonis non* in the estate of Nicholas Wecker the same person, A. J. Mastalir, who was the administrator of the estate of Ida Wecker. The transcript in the county court proceedings shows that the county judge and the appellees had the idea that the two estates were to be coupled, in the title and in some references elsewhere. To some extent this practice persisted in the district court. The appellants, however, filed their petition and reply in the county court as well as in the district court as in the estate of Ida Wecker, seeking to impress upon the distribution of her personal property the character of personality belonging to her alone, whereas the answers setting forth the position of appellees in the county court and in the district court more or less vaguely coupled the two estates and described the administrator as being administrator of both estates. In the circumstances we think the matter should have been considered, as we think it in fact was in effect considered, as arising in the estate of Ida Wecker alone. The source of the personal property derived by Ida Wecker from the estate of Nicholas Wecker, the amount thereof, the terms under which she took it, and like questions, were evidential facts to be discovered from facts arising in the estate of Nicholas Wecker, but that did not prevent the settlement of the controversy, between the parties here, in the proceedings in the estate of Ida Wecker. The stipulation of the parties heretofore partly quoted from the evi-

dence seems to indicate that this was the real understanding of the parties.

While A. J. Mastalir as administrator filed and verified the answers both in the county court and district court, it is apparent that on both occasions he was acting in the interests of the six remaindermen who were expressly substituted for him as parties in the trial in the district court. The same attorney who represented him in the county court and when he filed his answer in the district court continued to represent appellees in the district court after they were substituted as parties for the administrator. In these circumstances neither the appellees nor appellants were prejudiced nor will be heard to say that the issues were between different parties in the county and district courts.

The appellees cross-appealed and asked for more than they got by the decree of the district court. Their right so to do is questioned by appellants. It is not necessary to consider this matter as it goes back to the district court with the appeal.

For the reasons stated, the judgment of the district court is reversed and the cause remanded for a new trial in accordance with the views expressed in this opinion.

REVERSED.

GOLDIE KUBICEK, APPELLANT, V. WILLIAM SLEZAK, APPELLEE.

FILED APRIL 3, 1930. No. 27080.

Evidence. In an action for damages caused by an assault with intent to commit rape, an ordinary observer who was an eye-witness to the felonious act may testify to the appearance of plaintiff at the time as indicating fear, and the exclusion of such testimony may be prejudicial error.

APPEAL from the district court for Fillmore county: ROBERT M. PROUDFIT, JUDGE. *Reversed.*

Bartos & Placek, for appellant.

Waring & Waring, contra.

HEARD before GOSS, C. J., ROSE, DEAN, GOOD, EBERLY and DAY, JJ., and MESSMORE, District Judge.

ROSE, J.

This is an action to recover damages in the sum of $50,000 for assault with intent to commit rape. The answer to the petition was a general denial. Upon a trial of the issues the jury rendered a verdict in favor of defendant. From a judgment dismissing the action plaintiff appealed.

One of the assignments of error challenges a ruling that prevented the mother of plaintiff from testifying to the appearance of plaintiff immediately after the assault as the former described it on the witness-stand.

At the time of the felonious assault pleaded in the petition, plaintiff was a female child about 9 years of age and defendant was a boy of 18. The father of plaintiff and the father of defendant were neighboring farmers and were jointly interested in threshing grain. They were thus engaged on the latter's farm July 14, 1927. On the morning of that day plaintiff and her mother were at the home of defendant's parents, where the mother and other women were cooking for threshers. Defendant was at work hauling wheat and scooping it into a granary a short distance from his father's house. While at the granary defendant called to some one at the house for a broom. Plaintiff carried it to him. Shortly afterward her mother left the house, emptied some tin cans into a spring wagon used for removing garbage, and before returning to the house went to the granary. She testified on the witness-stand to what followed, saying, among other things, she heard a cry, looked through a door in the granary, saw defendant in an attempt to commit rape upon plaintiff, and called defendant's mother and told her of the offense. Later, in the direct examination of plaintiff's mother as a witness, she was asked, referring to her little daughter immediately after the assault:

"How did she appear to you as you observed her as to being scared or otherwise?"

The trial court sustained an objection to the question as calling for a conclusion; "incompetent, irrelevant, and immaterial." Plaintiff excepted and offered to prove that, at the time, plaintiff appeared to be scared. A similar objection to the offer was sustained by the trial court.

The exclusion of this testimony is properly presented for review. Error in the rulings is obvious. The appearance of plaintiff immediately after the felonious assault to which the witness testified was material to plaintiff's case. That plaintiff appeared to be seized by fear as an instantaneous result of the violence described by the witness was evidence tending to prove both assault and resulting injury. Fear may be apparent on the face of an outraged female child. If it was reflected by distorted features, that fact was part of plaintiff's case. Shock produced by a revolting crime against sex may injure both mind and body. The fear of imminent ravishment may be far-reaching in its effect. It has been known to produce permanent insanity. The evidence rejected was the best obtainable under the circumstances. Generally such testimony comes from nonprofessional and nonexpert witnesses. The mother of plaintiff was competent to testify to facial appearance as well as to outcry. If she told the truth, she saw her infant daughter, when crying, about to be violently ravished. Courts usually admit testimony like that excluded. The reasons for its admissibility have been judicially explained time and again. In *Struble v. Village of DeWitt*, 89 Neb. 726, it was held:

"Nonexpert witnesses are competent to testify as to circumstances and conditions that any person of ordinary intelligence might observe, and such witnesses may testify whether a person who has been injured, and with whom they were familiar, appeared to be suffering pain, the appearance of her injury, and similar matters observed by them tending to show the nature and extent of the injury."

In *McKennan v. Omaha & C. B. Street R. Co.*, 97 Neb. 281, 285, the court said:

"The first point urged is that the court erred in permitting nonexpert witnesses to testify to their conclusion or

opinion that McKennan was sick and hurt and suffered pain. It is said that this invaded the province of the jury. We think there is no merit in this contention. In 2 Jones, Commentaries on Law of Evidence, sec. 366, it is said, quoting from a New Hampshire case (*Hardy v. Merrill*, 56 N. H. 227): '"But without reference to any recognized rule or principle, all concede the admissibility of the opinions of nonprofessional men upon a great variety of unscientific questions arising every day and in every judicial inquiry. These are questions of identity, handwriting, quantity, value, weight, measure, time, distance, velocity, form, size, age, strength, heat, cold, sickness and health, questions also concerning various mental and moral aspects of humanity, such as disposition and temper, anger, fear, excitement, intoxication, veracity, general character and particular phases of character, and other conditions and things, both moral and physical, too numerous to mention." Admittedly difficult as the task of framing a rule on the subject is, Foster, Chief Justice, in the New Hampshire case referred to, formulated a rule, which, if properly applied, will serve as a useful instruction. Opinions of witnesses derived from observation are admissible in evidence when, from the nature of the subject under investigation, no better evidence can be obtained.' See, also, 3 Wigmore, Evidence, sec. 1974; *Hewitt v. Eisenbart*, 36 Neb. 794; *Western Travelers Accident Ass'n v. Munson*, 73 Neb. 858."

"Fear" is enumerated as one of the subjects to which the rule of evidence applies. The principle generally recognized has been stated in the following language:

"When the circumstances are such that all the facts cannot be placed before the jury with such clearness as to enable them to draw a correct inference, and the province of the jury is not invaded, and the inference is not one for the drawing of which special skill, knowledge, and experience are required, an ordinary observer who has had suitable opportunity for observation may state the apparent physical condition of another person, or testify as to what are more distinctly inferences from animate bodily phenomena." 22 C. J. 618, sec. 711.

Error, therefore, is apparent on the face of the record. That the rulings reviewed were harmless is not a sufficient answer to the assignment of error considered. The circumstances disclosed by the entire record do not seem to justify a finding that the trial below did not result in a miscarriage of justice.

For the errors pointed out, the judgment of the district court is reversed and the cause remanded for further proceedings.

REVERSED.

HELLEN UDE, APPELLEE, V. MODERN WOODMEN OF AMERICA, APPELLANT.

FILED APRIL 3, 1930. No. 27118.

Insurance: ACTION: DEFENSE: BURDEN OF PROOF. When a fraternal beneficiary society issues a benefit certificate to a new member and admits the insured to membership in the society and admits the acceptance by it of all dues and assessments required by the society under the terms of the benefit certificate, and pleads an affirmative defense, it devolves upon such fraternal society to establish such defense, and, where the evidence is conflicting, the question is for the jury.

APPEAL from the district court for Jefferson county: FREDERICK W. MESSMORE, JUDGE. *Affirmed.*

Nelson C. Pratt and *George G. Perrin,* for appellant.

Heasty, Barnes & Rain, contra.

Heard before GOSS, C. J., DEAN, GOOD, EBERLY AND DAY, JJ., AND CARTER AND CHASE, District Judges.

DEAN, J.

This action was begun in the district court for Jefferson county by Hellen Ude, plaintiff, to recover $1,000 from the Modern Woodmen of America, defendant, under the terms of a fraternal beneficiary insurance certificate, dated June 15, 1927, which was issued by the defendant society to her uncle, Captain C. Parker, and wherein plaintiff was named

as the sole beneficiary. Plaintiff recovered a verdict and judgment thereon for $1,086.70, from which the defendant has appealed.

In its answer the defendant society admitted that all required assessments and dues had been paid by the insured from the date of his acceptance as a fraternal member until his death, and that due notice of his death, on February 4, 1928, was given by plaintiff to defendant. But as a part of its defense the society alleged that the insured was not in sound health when the certificate was issued, and that his death "resulted directly or indirectly from his use of intoxicating liquors."

On the part of the defendant, evidence was introduced tending to prove that certain witnesses, who were members of the society, had seen Parker when he appeared to be intoxicated, and some witnesses testified that he had some difficulty in breathing at times, and that from his general appearance they did not think that he was a strong man. Other members of the order testified that, while they believed that he drank, they made no objection to his admission into the brotherhood on this ground. But some testified that they had seen him in the performance of heavy physical labor, such as cutting ice and the like, not very long before his death.

Shortly before his death, Parker went to a physician to have his throat X-rayed. This physician testified that Parker was in more or less distress just before he died, but that he appeared to be a "fairly well-nourished man." Other witnesses testified for plaintiff that they had long known Parker and that he was a strong man and appeared to be in good health and that they had never seen him intoxicated. This evidence was introduced as tending to show that Parker's health and strength and his physique were in a normal condition until he was overtaken by his final illness.

The examining physician for the defendant society testified that he examined Parker three or four days before his death and that the patient then had an attack of flu and

was suffering from some throat trouble. The immediate cause of Parker's death, he testified, was probably bronchial pneumonia. This witness also testified that he never knew of Parker calling any doctor to attend him before his last illness came upon him. This witness was by marriage related to Parker, but, of course, it does not follow that his evidence should be held for naught.

The record discloses that it was the duty of the general secretary of the society to pass upon the applications for membership; that he did not necessarily know the applicants personally but relied upon the statements of the examining physicians in respect of physical condition and the like. It appears, too, from the evidence that the secretary relied on Parker's statements in respect of health and of abstention from the use of intoxicants, just as he did in that of other applicants. And it may be noted that Parker had previously been a member of the lodge but had allowed his membership to lapse, but he was subsequently reinstated; so that he passed within the portals of the society two times. The secretary, it may be observed, pointed out that the procedure for readmittance is the same as for admittance to membership under the original application.

The evidence before us conflicts in respect of the physical condition of the injured, but there is, nevertheless, competent evidence which tends to prove that Parker was not a weakling at any time material to this controversy. Some witnesses testified that they had seen him perform strenuous manual labor shortly before his death, as noted above, and some testified that he had the appetite of an average healthy man and appeared to be fairly strong. The examining physician apparently considered him a good risk, for he so reported him to the general secretary of the defendant society. And the jury, as triers of fact, found in favor of the plaintiff on the material issues which are involved here and against the defendant society, under instructions that appear to state the law applicable to the facts.

It appears to us that when a fraternal beneficiary society issues a benefit certificate to a new member and admits the

insured to membership in the society and admits the acceptance by it of all dues and assessments required by the society under the terms of the benefit certificate, and pleads an affirmative defense, it devolves upon such fraternal society to establish such defense, and, where the evidence is conflicting, the question is for the jury. Clearly the agents of the defendant society knew of the condition of which complaint is now made long before the death of the insured, but there is not a syllable of evidence which goes to show that any of the members in any manner remonstrated with the insured in respect of his alleged fondness for intoxicating liquors. *Modern Woodmen of America v. Colman*, 68 Neb. 660; *Modern Woodmen of America v. Berry*, 100 Neb. 820; *Warren v. Grand Lodge, A. O. U. W.*, 104 Neb. 810, and cases there cited.

The jury in the present case and the trial judge alike saw and heard and observed the demeanor of the witnesses when they testified and are therefore more capable of judging of the weight of the evidence than a reviewing court which is confined to the printed page for its conclusions as to the merits of the subject-matter. This rule is so well established in this jurisdiction that it has become a fundamental in Nebraska practice. In view of the facts before us, and the law applicable thereto, we conclude that the judgment of the district court must be and it hereby is

AFFIRMED.

ELMER J. NEVILLE, APPELLEE, V. CITY OF OMAHA, APPELLANT.
JOSEPHINE PLATNER, APPELLEE, V. CITY OF OMAHA, APPELLANT.
GEORGE T. MORTON, APPELLEE, V. CITY OF OMAHA, APPELLANT.
N. P. DODGE COMPANY, APPELLEE, V. CITY OF OMAHA, APPELLANT.
ALFRED D. FOSTER ET AL., APPELLEES, V. CITY OF OMAHA, APPELLANT.
ELMER J. NEVILLE ET AL., APPELLEES, V. CITY OF OMAHA, APPELLANT.
MYRON L. LEARNED ET AL., APPELLEES, V. CITY OF OMAHA, APPELLANT.

FILED APRIL 3, 1930. NOS. 27283, 27284, 27285, 27286, 27287, 27288, 27289.

1. **Municipal Corporations**: PUBLIC IMPROVEMENTS: SPECIAL ASSESSMENTS. Special assessments upon real estate for a public improvement cannot exceed in amount the special benefit conferred upon the property by such improvement.
2. **Record** examined, and *held* to sustain the findings and decrees of the trial court.

APPEAL from the district court for Douglas county: WILLIAM G. HASTINGS, JUDGE. *Affirmed.*

John F. Moriarty, T. J. O'Brien and *B. J. Boyle*, for appellant.

Rose, Wells, Martin & Lane, Crofoot, Fraser, Connolly & Stryker, William Baird & Sons, Kennedy, Loomis & Offutt, W. H. Herdman, and *Johnson, Moorhead & Rine, contra.*

HEARD before GOSS, C. J., DEAN, GOOD, EBERLY and DAY, JJ., and MESSMORE, District Judge.

GOOD, J.

In each of the above entitled causes there is involved the question as to whether certain special assessments, made by the proper authorities of the city of Omaha for a public

improvement, exceed the special benefits conferred upon the properties of plaintiffs by reason of such improvement.

The city of Omaha caused Twentieth street, between Dodge street, on the north, and Leavenworth street, on the south, to be widened, and the cost of such improvement was nearly $800,000. Assessments for special benefits conferred were levied against the properties of plaintiffs and others either abutting upon or in close proximity to the widened part of the street. From the assessments so made the plaintiffs appealed to the district court, where the cases were tried together upon one record. In cases numbered 27283, 27284, 27286, 27287, 27288, and 27289, the trial court found that the special assessments exceeded the special benefits conferred, and canceled the assessments to the extent that they were found to be excessive. In case No. 27285, which involves several different parcels of land, the trial court found that, as to some of them, the special benefits equaled the amount of the special assessments, and, as to these parcels, the assessments were upheld. As to two tracts, the court found that no special benefits were conferred by the improvement, and, as to these, the special assessments were canceled in their entirety. As to the other tracts or parcels in that case, the trial court found that the assessments levied exceeded the special benefits conferred by the improvement, and canceled the assessments to the extent that they were found to be excessive. From the decree entered in each of the cases, the city of Omaha has appealed to this court, and the causes were here argued and submitted together.

Counsel for defendant city contend that the assessment in each case made by the city was not in excess of the special benefits conferred on the plaintiffs' properties by reason of the public improvement, and that the findings and judgment of the trial court are not sustained by the evidence.

Both parties concede the rule of law to be that special assessments on real estate for a public improvement cannot exceed the special benefits conferred by the improvement.

The questions for determination are, therefore, merely questions of fact. The evidence is in irreconcilable conflict as to the special benefits conferred by the improvement in each instance. That on behalf of the city, standing alone, tends to support the city's contention that the benefits conferred by the improvement are equal to or in excess of the amount of the assessment in each instance made; while the evidence on behalf of each plaintiff tends very strongly to show that in some instances no special benefit whatever was conferred by the improvement, and that in all other cases the special assessments were very greatly in excess of any special benefits accruing by reason of the public improvement.

The improvement consisted in taking a strip of land, 20 feet wide, on one side of the street for a number of blocks and a strip, 40 feet wide, on the other side for several blocks, and, as above noted, the total cost of the improvement was nearly $800,000. The amount assessed back against the real estate in the vicinity of the improvement, for special benefits, exceeded $700,000. Each of the parties called expert witnesses to testify as to the value of the respective properties of the plaintiffs before and after the improvement and as to the amount of benefits which were conferred on the respective tracts by reason of the public improvement. Each witness gave his reasons for his opinion. In addition, there was evidence by the plaintiffs tending to show that after the construction of the improvement rental values of the properties of the plaintiffs, which either abutted upon or were in close proximity to Twentieth street, had not increased, but in most instances had decreased. It was also shown that there had been a number of sales of real estate which had been assessed for special benefits, and that the actual sales were for less amounts than the conceded values before the improvement. It should be stated that the trial in the district court was about two and one-half years after the public improvement was determined upon and some time after it had been completely finished.

The record is voluminous. We have examined it with

considerable care, and we might apply, and rest the decision in this case upon, the rule often announced by this court, that in a trial *de novo* of a suit in equity on appeal this court, in reaching an independent conclusion, without reference to the conclusion reached by the district court, as required by the statute, is not precluded from giving some weight to the findings of the trial court when the evidence is conflicting and in serious doubt. We do not find it necessary, however, to invoke this rule, to aid the court in disposing of these appeals.

From an examination of the record, including the exhibits and the oral testimony, we are convinced that each finding of the trial court is fully and amply sustained by the evidence. We are satisfied that no special benefits accrued to the properties where the special assessments were entirely canceled, and we are fully satisfied that the special benefits, accruing to the properties by reason of the public improvement, in none of the cases exceed, if, indeed, they equal, the amounts to which the assessments were approved by the trial court. We are convinced that the evidence required the cancelation of the special assessments to the extent that it was done by the decrees in the several appeals.

No error prejudicial to the appellant is disclosed in any of the appeals. The judgment of the district court in each of the above cases is, therefore,

AFFIRMED.

OMER W. VOGES, APPELLEE, V. MECHANICS INSURANCE COMPANY, APPELLANT.

FILED APRIL 3, 1930. No. 27042.

1. Insurance: POLICY: CONSTRUCTION. Policy of insurance in suit construed and the following provisions, viz., "This company shall not be liable beyond the actual cash value of the property at the time any loss or damage occurs, and the loss or damage shall be ascertained or estimated according to such actual cash value, with proper deduction for depreciation however caused, and shall in no event exceed what it would then cost the insured to repair or replace the same with material of like kind and quality," *held,*

(a) To be a valid stipulation and determinative of the rights and liabilities of the insurer and insured and applicable to losses not within the scope of the Nebraska valued policy act;
(b) That, when applicable, "the loss or damage shall be ascertained or estimated according to such actual cash value, with proper deduction for depreciation however caused;" and
(c) That the provision, "the loss or damage * * * shall in no event exceed what it would then cost the insured to repair or replace the same with material of like kind and quality," constitutes merely a limitation upon the amount of the recovery, and is not a substantive measure of damages which the insured can invoke.

2. ———: ———: ———. As applied to the facts in the present case, the provisions of this policy contemplate that the "actual cash value" of the building as it stood on the ground prior to the fire shall be compared with the "actual cash value" of the same building at the conclusion of the fire, and that the difference shall be taken as the measure of damages, subject, however, to the limitations expressed in the terms of the policy.

APPEAL from the district court for Lancaster county: JEFFERSON H. BROADY, JUDGE. *Reversed.*

C. C. Flansburg, for appellant.

Andrew P. Moran, R. H. Hagelin and *Fields, Ricketts & Ricketts, contra.*

HEARD before GOSS, C. J., ROSE, DEAN, GOOD, EBERLY and DAY, JJ., and MESSMORE, District Judge.

EBERLY, J.

This is an action on a fire insurance policy to recover damages for partial loss occasioned by fire, in the building insured, on the 7th day of November, 1927. There was a trial to a jury and verdict returned in favor of appellees for the sum of $5,432.66. Motion for new trial on behalf of the insurance company was overruled and judgment for this amount entered. The insurance company appeals.

The controlling question presented by the record is as to the correctness of the measure of damages as defined by the instructions and applied to the evidence then before the trial court. In fact, the substantial dispute between the parties is even more restricted. It may be said to be limited

to the question of damages to the rear or south wall of the building insured. The appellee sought to establish the damages to this portion of the building, as elsewhere, by proof of the work to be done and material needed to repair the building, and his evidence appears to be limited to these topics. Assuming this evidence of appellee to be true, it establishes only the cost of replacement of the damaged structure which is reflected in the verdict returned as the damages suffered and recoverable under the policy. In pursuance of this theory the district court instructed the jury:

"If you find from the evidence that the walls of the building are cracked or otherwise damaged by fire or water, or both, to such an extent that they would need be torn down and rebuilt, or repairs made to the walls, or any part thereof, which such damage and the cost of repairing said walls would be damages for which the plaintiff would be entitled to recover;" and also, "That the defendant, the insurance company, must accept the building in the condition in which it was at the time the insurance policy was written and cannot be heard to complain that the building may not have been a solid structure or that there may have been some defects in the walls prior to the date of insurance, but such defects can only be taken into consideration by you for the purpose of determining that, if there were such defects if the fire and water would have caused more damage than if the walls had been of solid structure, and, if so, that defendant would be liable therefor."

In this connection it appears that this building at the time of the fire occasioning the damage incurred had been constructed for 55 years. The brick used were soft sand brick, and the mortar, lime mortar. The rear wall was cracked and had been defective for more than 30 years prior to the date of the fire, and the evidence is to the effect that "the building had not been kept in repair." The effect of the litigation thus far is to require the insurance company to replace the wall which was defective and damaged prior to the fire by a wall substantially perfect in construction

and material irrespective of the relative value of each. Thus, in truth and in fact, the trial court establishes as a sole substantive measure of damages invokable as such by the insured that replacement, under the facts in this case, was the measure of recovery.

There is no substantial dispute between the parties on the fact that the loss comprising the cause of action in the present case is partial, and that therefore the policy in this case is an open one as contradistinguished from a "valued policy." It also fairly appears that the policy in dispute is "on a form prescribed by the department of trade and commerce as nearly as practicable in the form known as the New York standard" form. Comp. St. 1922, sec. 7836. The terms of this policy provide: "This company shall not be liable beyond the actual cash value of the property at the time any loss or damage occurs, and the loss or damage shall be ascertained or estimated according to such actual cash value, with proper deduction for depreciation however caused, and shall in no event exceed what it would then cost the insured to repair or replace the same with material of like kind and quality. * * * It shall be optional, however, with this company * * * to repair, rebuild, or replace the property lost or damaged with other of like kind and quality within a reasonable time on giving notice, within thirty days after the receipt of the proof herein required, of its intention so to do." There is no question under the facts appearing in the record that the insurance company has not sought to avail itself of the option last quoted.

With reference to substantially identical policy provisions it has been said: "Now, unless it can be shown that they had not the right so to contract, or have used terms possessing some other than their ordinary meaning and import, this basis for estimating the loss thus established must control and govern. It is the law of the contract established by the parties themselves. Nothing has or can be shown, we think, to countervail their right so to contract in regard to the subject-matter mentioned, or which controls the ordinary meaning of the terms used by them. This has not

and cannot be done. The contract is so plain that interpretation is not needed to arrive at what was meant. The parties meant only what they have plainly said." *Commonwealth Ins. Co. v. Sennett, Barr & Co.*, 37 Pa. St. 205. The language employed in the policy in suit applies to partial destruction of property and prescribes that in such cases "the loss or damage shall be ascertained or estimated according to such actual cash value, with proper deduction for depreciation however caused." And solely as a limitation of the liability thus expressed appear the words: "And shall in no event exceed what it would then cost the insured to repair or replace the same with material of like kind and quality." In support of this conclusion it is to be noted that the quoted language is from the "New York standard form," and due to this fact decisions from the appellate courts of that state on this subject have a special importance. In consideration of the point suggested, the language quoted from the policy in suit was before the appellate court of New York in the case of *McAnarney v. Newark Fire Ins. Co.*, 247 N. Y. 176, in which it was determined that the provisions to the effect that the liability shall not exceed the cost of repair or of replacement is by its terms merely a limitation on the insurer's liability, and is not a substantive measure of damages which the insured can invoke. See, also, *McCready v. Hartford Fire Ins. Co.*, 61 App. Div. (N. Y.) 583.

In the case of *Citizens Savings Bank & Trust Co. v. Fitchburg Mutual Fire Ins. Co.*, 86 Vt. 267, the supreme court of that state in construing the identical provision here presented stated as its conclusion: "The policy makes the cash value of the building destroyed the basis of ascertainment, taking into account its previous depreciation from all causes; and makes the cost of present construction a mere limitation upon the extent of the recovery. The cost of a new building may limit the recovery, but cannot be made a controlling factor in the conduct of the inquiry. The cash value of the building destroyed is the fundamental fact to be established, and any evidence which has a legitimate

tendency to prove that fact is admissible." And it further declared: "The apparent purpose of the provision is to protect the insurer from appreciations of real estate values which are not caused by and do not depend upon the cost of construction. The policy does not make the cost of replacement the invariable test of actual cash value, but limits the recovery in cases where an ascertainment according to actual cash value would exceed that amount. The defendant may guard against a possible finding in excess of the cost of replacement by introducing evidence of what the cost would be. But it cannot confine the plaintiff to proof of that character by making the cost of construction the basis of ascertainment."

In the case of *Granite State Fire Ins. Co. v. Buckstaff Bros. Mfg. Co.*, 53 Neb. 123, in a case where the character of the property as to whether real or personal was in question, the rule was announced that the insured "may show the value as it was just before the fire, and its value just after, as affording data for the assessment of his damages, without attempting to classify the property as real or personal."

We therefore conclude that the controlling language heretofore quoted from the policy in suit applies to both partial and total losses, and, except as governed by our valued policy enactment, to real as well as personal property. As applied to a partial destruction of real estate the language: "The loss or damage shall be ascertained or estimated according to such actual cash value, with proper deduction for depreciation however caused"—contemplates that the "actual cash value" of the building as it stood on the ground shall be compared with the "actual cash value" of the same building after the conclusion of the fire, and that the difference shall be taken as the measure of recovery, subject however to the limitation expressed in the terms of this policy. It would seem that when the owner of a building, damaged through the hazard of fire, has received compensation for his loss which, together with the then actual cash value of the damaged structure after the conflagration, con-

stitutes the equivalent of the actual cash value of the building immediately prior thereto, he, as assured, has been fully indemnified as contemplated by the terms of his contract. More than this he cannot exact. In the present case it would seem obvious that if the plaintiff be sustained in his claim for repairs, including the replacement of the rear wall, his building will then possess an actual cash value in excess of what it had prior to the time of the fire. It is evident therefore that the real error committed by the trial court was to regard the limitation stated in the terms of the policy, "and shall in no event exceed what it would then cost the insured to repair or replace the same with material of like kind and quality," as a substantive measure of damages instead of a limitation upon what might be otherwise recovered under the terms of the contract.

It follows, therefore, that the cause must be, and is, reversed and remanded for further proceedings consistent with this opinion.

REVERSED.

BENJAMIN L. ALLENDER, APPELLEE, V. CHICAGO & NORTHWESTERN RAILWAY COMPANY, APPELLANT.

FILED APRIL 3, 1930. No. 27078.

1. **Evidence** examined, discussed in the opinion, and *held* sufficient to sustain the verdict of the jury.
2. **Trial:** PEREMPTORY INSTRUCTION. Where there is evidence on a controverted issue of fact sufficient to support a verdict in favor of plaintiff, it would be erroneous to give a peremptory instruction in favor of defendant.
3. **Evidence:** ADMISSIBILITY: MARKET VALUE. Where the question was as to the market value of live stock at the place said live stock was to be marketed, the testimony of a witness in the live stock business at that place that he had been buying and selling cattle daily for years, that his firm held auction sales every Saturday and that he was the auctioneer when these sales were held, that he received the market reports daily over the radio, that he was a subscriber to the Daily Journal and the Stockmen's Journal and consulted them as to the prices prevailing on the day the cattle in question were sold, that it was his custom to see what happened to the market every day, that he

saw the cattle in question and personally auctioned them, is competent, and such testimony was admissible for the purposes for which it was offered.

4. ———: COMPETENCY OF EXPERT: MARKET VALUE. Likewise, a witness testifying that he had years of experience in the cattle business and in shipping cattle, had seen the cattle in question on different days immediately prior to the time they arrived at the place of unloading, was familiar with the market value of cattle at various live stock markets, of which the place of unloading the cattle in question was one, and knew what cattle were selling for at the time on these various markets, is a competent witness as to the market values of cattle at the place of unloading or where the cattle were to be marketed.
5. ———: ———: WEIGHTS OF CATTLE. Testimony of witnesses experienced in purchasing and handling cattle, buying and selling them on their judgment and who had seen the cattle in question at the loading point at or about the time they were loaded, some of whom had seen the cattle loaded, knew the kinds and sizes of said cattle, had found by experience that by inspection they could estimate the weights of such animals with accuracy, is competent to show the average weight of the animals at the loading point.
6. Appeal: NEW TRIAL: DISCRETION OF COURT. A motion for a new trial on the ground of newly discovered evidence is addressed to the sound discretion of the court and, on appeal, the ruling thereon will not be disturbed, unless a clear abuse of discretion is shown.

APPEAL from the district court for Holt county: ROBERT R. DICKSON, JUDGE. *Affirmed.*

Wymer Dressler, Robert D. Neely and *Hugo J. Lutz,* for appellant.

M. F. Harrington and *George M. Harrington, contra.*

HEARD before GOSS, C. J., ROSE, DEAN, GOOD, EBERLY and DAY, JJ., and MESSMORE, District Judge.

MESSMORE, District Judge.

Plaintiff shipped four carloads of cattle over defendant railroad from Oral, South Dakota, to Fremont, Nebraska, and instituted this action in the district court for Holt county to recover damages to said cattle on account of negligence, rough handling, and also for the loss of three head

and the loss by death of one, and unreasonable delay in transit.

Defendant denied negligence on its part, and alleged that if financial loss accrued to plaintiff said loss was due to plaintiff's negligence.

Plaintiff replied to defendant's answer by a general denial.

After the admission of all of the evidence, the district court took from the jury all consideration of the question of unreasonable delay in transit on the part of defendant.

The jury returned a verdict for plaintiff in the sum of $1,059.69, upon which judgment was entered, and from which judgment defendant appeals.

Defendant contends that the verdict is not sustained by sufficient evidence, and that the court erred in refusing to direct a verdict for defendant. These two assignments may be considered together.

In determining the sufficiency of the evidence all of the evidence must be taken into consideration.

Plaintiff, in support of his contention as to the rough handling of the cattle by, and the negligence of, defendant, related what occurred on the trip, that the movement of the train was unusually rough, intimated that he was thrown from his seat in the caboose on account of the rough handling of the train *en route*, and also stated that he got out several times to examine the cattle, and that in practically every instance there were some cattle down in the cars and that he was obliged to get them up with a prod pole. He also introduced the testimony of witnesses, who were experienced in the cattle business, who saw the cattle and had examined them before they were shipped, and also introduced the testimony of other experienced cattlemen to show the condition of the same cattle at the time they arrived at Fremont, where they were to be marketed, and that at that time the cattle were bruised, gaunt, lame, and the hair had been scraped off certain of the animals, that some were bleeding from their heads, the hoofs of others were bleeding, and other general statements as to their appearance and condition.

Contra to this evidence defendant introduced evidence to show that nothing unusual happened on the trip, that it was necessary and incident to the shipping of cattle that they be prodded up and made to stand, and produced train records as to the handling of the train and the location of the cars containing the cattle in the train.

Defendant cites the case of *Quinby v. Union P. R. Co.*, 83 Neb. 777, to the effect that the carrier is not liable for injuries to live stock due to their propensities to injure each other from fright or other causes. The case cited is distinctively different from the case at bar. The stock in question in that case was left on the tracks of defendant company for about three hours. There is a distinction where stock is detained in a car standing still for three hours and where stock is transported over tracks a distance of approximately 500 miles and consuming 35½ hours on the trip. We have no quarrel with the law as stated in the case cited, but we cannot agree with counsel for defendant that the case at bar is governed by the same rules as in the case cited. We are inclined to accept the decision of this court in case of *Herold v. United States Express Co.*, 98 Neb. 217, in which this court held: "While a common carrier of live stock is not an insurer against injuries unavoidably resulting from the inherent nature or propensities of the animals, yet, where animals are shipped, it is its duty to exercise such care as the circumstances indicate is reasonably necessary in order to safely transport them, and if, on account of a failure to exercise such care, the animals are injured, are lost, or die, the carrier may be liable for damages."

From the evidence it appears that there was a controverted issue of fact upon the proposition of negligence of defendant company and the rough handling charged to it. This being true, the court was in duty bound to submit the issue of negligence and rough handling to the jury, and, as this court has said, where there is a controverted issue of fact, it would be erroneous for the trial court to give a peremptory instruction. The trial court was correct in refusing to direct a verdict for the defendant.

Defendant assigns as error the receiving of the testimony of plaintiff and his witnesses, Moore and Borders, as to the market value of the cattle at Fremont, said testimony being without foundation, contrary to law, hearsay, and incompetent.

Plaintiff's witness, Colonel Borders, testified that he was an experienced cattle dealer and in the cattle business at the place of unloading the cattle, that he auctioned cattle once each week, that he personally auctioned these cattle, that he received the quotations on the cattle market over the radio each day, that he read the Stockmen's Journal and the newspapers, that he was acquainted with the prices of cattle at the place of unloading on the day they arrived there, and gave his opinion as to the market value of the cattle at Fremont.

Plaintiff, an experienced cattle dealer, testified as to the condition of the cattle, their kinds and classes, their average weights at the place of loading, and their appearance and condition at the place of unloading.

Witness Moore, an experienced cattleman, saw these cattle on different days at the place of loading, knew their sizes and kinds, had bought and sold cattle, and was acquainted with the market values of the cattle at the place where they were unloaded and to be marketed.

Such testimony is competent and admissible to show the market values of cattle at the place where they are to be marketed. *Westphalen v. Atlantic N. & S. R. Co.*, 152 Ia. 232; *Hudson & Co. v. Northern P. R. Co.*, 92 Ia. 231.

In the *Westphalen* case, *supra*, the trial court admitted the testimony of men who were experienced in the purchase and handling of cattle, and who had been in the habit of buying and selling cattle on their judgment, and who had found by experience that they could by inspection estimate the weights of such animals with accuracy, and the appellate court held the testimony of such witnesses competent from observation of the cattle at their destination as to their average weight at the place where loaded for transportation.

In the *Hudson* case, *supra*, the court held that a witness is competent to speak as to the market value of live stock, if he bases his opinion upon the market reports and quotations.

Defendant objected to the competency of this testimony for the reason that there were no sales' records of any other cattle shown as of January 14, 1928, the date that most of these cattle were auctioned, and that stock journals, which are competent evidence, were not received in evidence to show the state of the market on that date, that no record of other sales was shown except the sale of one bull calf, which was not sold by the pound, and, further, that the witness Moore was not in Fremont on the date the cattle arrived there or were sold.

Defendant cites the case of *Trennt v. Chicago, B. & Q. R. Co.*, 107 Neb. 406, wherein this court held that market reports in journals, properly authenticated, are competent evidence of the state of the market. Defendant contends that in the case at bar no such market reports and journals were received in evidence.

In the case of *Chicago, B. & Q. R. Co. v. Todd*, 74 Neb. 712, it was held that market reports and journals, such as the commercial world relies upon, are competent evidence of the state of the market.

In the *Trennt* case, *supra*, the testimony of a witness was held to be incompetent who testified that he did not know the market at or near the time in question, nor remember the number, kind, or class of property under consideration, or any other similar transaction, and whose sole statement bearing on such question was what he recollected three years later. In that case it was held that, while market reports, properly authenticated, are competent evidence of the state of the market, it does not follow that they are the only competent evidence thereof. This is true. However, weighed against the evidence of plaintiff and his witnesses in the case at bar, as hereinbefore set out, we believe plaintiff and his witnesses competent, under the circumstances of this case, to testify to the market values of the stock at the place of unloading.

Defendant further complains of and cites as error the admission of evidence introduced on behalf of plaintiff as to the market values of the cattle at the place of loading.

Plaintiff's evidence shows in this respect that the witnesses saw the cattle at the place of loading, knew the kinds and sizes of the cattle at that point, were experienced cattlemen, bought and sold cattle on their judgments, and could tell the weights of cattle by inspection with accuracy. The authorities in support of the admissibility of this evidence have heretofore been cited.

Defendant criticizes the admissibility of this evidence on the theory that the witnesses were not testifying from written memoranda made at the time, and that the memorandum from which plaintiff testified was made during the progress of the trial, and that without it such evidence, after a lapse of eleven months, was wholly incompetent. Persons of experience in the cattle business, knowing the kinds and sizes of the cattle purchased and having estimated at one time their weights and values, may recall the particular cattle in question when the subject-matter is called to their attention.

Counsel for defendant contend in this action that the subject of estimated weights and shrinkages is not a proper basis for recovery for rough handling in transit, as long as the issue of unreasonable delay had been withdrawn from the jury's consideration. While most of the cases upon which recovery is based for estimated weights and shrinkage in transit have been instituted and the recovery based upon unreasonable delay in transit, it seems apparent that on a long trip, even when the question of unreasonable delay has been withdrawn from the jury's consideration, negligence and rough handling on the part of defendant company could cause shrinkage in the animals, and that plaintiff is not bound to base his action strictly on the question of unreasonable delay, if the evidence warranted the findings of negligence and rough handling on the part of the defendant over a long trip such as the one in this case.

All of the instructions of the court have been examined

and considered together and properly reflect the law of the case and contain the substance of the instructions tendered by defendant.

Defendant's next assignment of error is that the court refused to grant a new trial on the ground of newly discovered evidence. In support of its motion defendant introduced an affidavit of one Jay Harrington who stated that he had purchased 17 head of mixed cattle from plaintiff on the 13th of January, 1928, the day before the cattle were auctioned at Fremont by Colonel Borders. The testimony was that Colonel Borders, who handled the cattle for plaintiff, was not clear as to the number of cattle that were sold to the said Harrington at private sale, but recalls that it might have been as high as 18 or 20 head. Plaintiff placed the number sold to Harrington at 16 head. Defendant contends that, inasmuch as the case went to the jury on the question of the loss of three head of cattle, and it was shown by the affidavit of Harrington that he had purchased 17 head, defendant accounted for one of the extra head alleged to have been lost and a new trial should have been granted.

Further supporting its contention, defendant states that exhibits A and 2 offered and received in evidence show a change by erasure and a change in the figures, so that the original and copy are not consistent with each other, with the intimation that a forgery was evident, and that this case was conceived upon these alleged changes as indicated by defendant in referring to these exhibits. We are inclined to the view that the exhibits, having been offered and received in evidence with the changes as they existed, were taken advantage of by defendant and that matter argued to the jury.

Defendant contends that 19 head of cattle were sold to Jay Harrington. Plaintiff's testimony was to the effect that 16 head had been sold to Mr. Harrington. This evidence appears in the record and was probably argued and stressed by defendant to the jury. The fact remains that from the record it appears that 143 head of cattle were loaded at Oral for shipment to Fremont. At Fremont, by

count, one calf was dead and three head of cattle were missing. The jury had a right to weigh the evidence, as hereinbefore set forth, for the reason that there is a direct conflict in the evidence as to the number of cattle alleged to have been lost. We feel that all the evidence was before the court and that the jury had the full benefit of it.

The trial judge overruled the motion for a new trial. A motion for a new trial on the ground of newly discovered evidence is addressed to the sound discretion of the court, and, on appeal, the ruling thereon will not be disturbed, unless a clear abuse of discretion is shown. *Christensen v. Omaha & C. B. Street R. Co.*, 85 Neb. 694; *Peterson v. Kouty*, 103 Neb. 321.

We conclude that the judgment of the lower court must be, and is hereby,

AFFIRMED.

HENRY HAWKINS, APPELLANT, V. W. E. MULLEN ET AL., APPELLEES.

FILED APRIL 11, 1930. No. 27308.

Vendor and Purchaser: FORECLOSURE: ORDER OF SALE: STAY. When, on the merits of a suit in equity on a contract to purchase land which a vendor refused or was unable to convey, the vendee treats the contract as a mortgage and accepts a decree of foreclosure granting him a lien for the money paid by him as fully as if it were a mortgage, the vendor is entitled to a stay of the order of sale under the decree upon filing his written request in compliance with section 8988, Comp. St. 1922.

APPEAL from the district court for Stanton county: CHARLES H. STEWART, JUDGE. *Reversed.*

A. E. Wenke and *Zacek & Nicholson*, for appellant.

S. L. Winters, contra.

HEARD before GOSS, C. J., ROSE, DEAN, GOOD, THOMPSON and DAY, JJ., and CARTER, District Judge.

GOSS, C. J.

The only question involved is whether the appellant, Haw-

kins, was entitled to a stay of nine months as if upon a decree for the sale of mortgaged premises.

The decree was entered pursuant to a mandate in *Hawkins v. Mullen*, 118 Neb. 129. The nature of the case must be stated to understand the issue involved here. Hawkins brought suit to quiet title against various parties. He obtained a favorable decree against all of them in the district court. Two of them appealed. One was Farmers Union Cooperative Association. It had a mechanic's lien arising by reason of repairs and improvements upon the premises, made partly under the direct authority of Hawkins and ratified by him as to the rest. The other appellant was Fleming. His interest arose by reason of the fact that his mother's rights in the premises had been assigned to him by quitclaim deed. The mother had paid Hawkins $9,500 as part payment on the land under an oral contract. He had declared the contract forfeited, and had refused to accept the balance of the purchase price or to refund the money paid. As shown in the opinion on the merits, Fleming claimed that the quitclaim deed "was in fact an equitable mortgage representing the amount of money advanced toward the purchase price of the property." This court reversed the judgment and remanded the case, with directions to the district court to ascertain the amount due on the mechanic's lien, to decree it to be a first lien on the premises and award foreclosure thereof; to award Fleming $9,500 with interest at 7 per cent. per annum "from the date of the forfeiture of said contract by appellee, as a condition for the cancelation of the quitclaim deed, and that, in default of such payment by appellee, the said deed stand as a second lien on said lands for the payment of said amount, and that appellant have foreclosure thereof." The decree was entered July 2, 1929, the request for stay was filed July 8, 1929, and the order, striking the request from the record and directing the issuance of an order of sale as provided in the decree, was made September 7, 1929.

Section 8988, Comp. St. 1922, is as follows: "The order of sale on all decrees for the sale of mortgaged premises

shall be stayed for the period of nine months from and after the rendition of such decree, whenever the defendant shall, within twenty days after the rendition of such decree, file with the clerk of the court a written request for the same: Provided, if the defendant make no such request within said twenty days, the order of sale may issue immediately after the expiration thereof."

There are, naturally, few cases construing this statute. We have held that the word "defendant" applies to the mortgagor or to persons in privity with him, and not to a cross-petitioner seeking to enforce a judgment lien upon the premises. *Clark v. Pahl,* 75 Neb. 161. That it does not apply to strict foreclosures. *Harrington v. Birdsall,* 38 Neb. 176. And, where a land contract was treated as a mortgage, a stay of execution upon request of defendants will be upheld as in the case of a mortgage. *Spencer v. Moyer,* 29 Neb. 305.

It is apparent that there is not involved here the enforcement of any lien for a judgment secured in a law action, nor was there any issue resulting in a decree for strict foreclosure. Hawkins contended, when the case was before us on the merits, as recited in the opinion there, "that, even though the appellant might be entitled to a return of the purchase money paid, it cannot be recovered in this action, but that he is relegated to his remedy at law, and this was the holding of the trial court." Fleming, however, prevailed on this point. It is thus clear that throughout the case, when in this court before and in the final decree in favor of Fleming's lien in the district court, his lien was treated as a mortgage lien.

In *Spencer v. Moyer, supra,* it was said: "The instrument sued on is not a technical mortgage, yet it was declared on in the petition substantially as a mortgage, was claimed to be a mortgage by the defendants in the answer, and the form of the decree is the same as it would have been had it been a mortgage in the most technical sense of the word."

The case last cited has not been criticized or overruled.

It is sought to be distinguished as not applicable because the request for stay there upheld was made by the vendee, whereas here the request was made by Hawkins, the vendor. We can see no force in the argument when considered in the light of the statute and its intent. The statute gives a "defendant" a right to a stay. Strictly speaking, Hawkins was not a defendant. He forestalled the defendants by bringing his suit in equity against them. They set up their equitable rights in his lands and secured no more and no less than if they had been plaintiffs and he the defendant. He did defend their claims and so as a matter of equity he was the defendant in Fleming's counterclaim asking for the allowance of an equitable lien and its foreclosure on the land of Hawkins to secure the repayment of the money paid for a title that Hawkins failed to transfer. We think that, within the meaning and intent of the statute, the request for stay was made by a "defendant."

The rule, as applicable to the instant case, may be put in this form: When, on the merits of a suit in equity on a contract to purchase land which a vendor refused or was unable to convey, the vendee treats the contract as a mortgage and accepts a decree of foreclosure granting him a lien for the money paid by him as fully as if it were a mortgage, the vendor is entitled to a stay of the order of sale under the decree upon filing his written request in compliance with section 8988, Comp. St. 1922.

For the reasons stated, the appellant was entitled to the stay of the order of sale for nine months from the date of the decree. The court erred in striking the request from the record. The judgment of the district court is therefore reversed at the costs of the appellee on this appeal in this court.

REVERSED.

STATE, EX REL. O. S. SPILLMAN, ATTORNEY GENERAL, v. DUNBAR STATE BANK: E. J. DEMPSTER, RECEIVER, APPELLANT: HENRY G. SEYFER ET AL., INTERVENERS, APPELLEES.

FILED APRIL 11, 1930. No. 26978.

Appeal: MOOT QUESTIONS. An appeal presenting nothing but moot questions may be dismissed upon the appellate court's own motion.

APPEAL from the district court for Otoe county: JAMES T. BEGLEY, JUDGE. *Appeal dismissed.*

C. M. Skiles, I. D. Beynon and *Albert S. Johnston,* for appellant.

Paul Jessen, Pitzer & Tyler and *D. W. Livingston, contra.*

HEARD before GOSS, C. J., ROSE, DEAN, GOOD, EBERLY and DAY, JJ., and LANDIS, District Judge.

ROSE, J.

This is a controversy between creditors of an insolvent state bank and the receiver over the allowance of a claim.

In a proceeding by the state of Nebraska to wind up the affairs of the Dunbar State Bank, Henry G. Seyfer, James Murray, Earl Seyfer and H. S. Westbrook intervened, filed a claim for $5,000 and pleaded a preference requiring payment out of funds in the hands of the receiver, if sufficient, but, if insufficient, demanding payment of the remainder out of the bank guaranty fund. The receiver contested the claim. Upon a trial of the issues raised by the pleadings, the district court ordered the receiver to pay interveners $1,100 out of bank assets or funds in his hands and allowed the remainder, or $3,900, as a claim against the bank guaranty fund. The receiver appealed to the supreme court, where the judgment of the district court was affirmed. *State v. Dunbar State Bank,* 230 N. W. 99.*

* Note—Opinion withdrawn, and judgment of affirmance adhered to in opinion reported in *State v. Dunbar State Bank,* 120 Neb. ——.

Before the transcript of the proceedings below was filed in the supreme court, however, interveners presented to the district court in the same case a motion for the immediate payment of the $1,100, as allowed, on the grounds that the receiver failed to supersede the original judgment within the time required by law and that he had not obtained permission to appeal. This motion was sustained by the district court and, from the order requiring such payment, the receiver perfected a second appeal, which is the only one now under consideration, the original judgment having been affirmed as stated.

In the supreme court interveners presented a motion to dismiss the second or present appeal on the grounds that permission to take it had not been granted by the trial court and that the original judgment had not been superseded. This latter motion was overruled by the supreme court with a view to a subsequent inquiry into the merits of the second appeal. Prior to the affirmance of the original judgment on the first appeal, the questions raised on the merits of the second appeal were argued and submitted but not determined.

The record now shows that the affirmance and the opinion upon the first appeal will prevent the receiver from obtaining any relief upon the second or present appeal. Nothing but moot questions remain undetermined. The controlling principle on the record as it now stands has been stated as follows:

"Courts properly decline to express an opinion on a mere abstraction, and may act on their own motion in dismissing an appeal involving only an inquiry of that nature." *McCarter v. Lavery*, 101 Neb. 748.

See, also, *Ververka v. Fullmers*, 83 Neb. 6; *Heesch v. Snyder*, 85 Neb. 778; *Brown v. Buckley*, 86 Neb. 572; *Deines v. Schwind*, 89 Neb. 122; *State v. Trainor*, 91 Neb. 848; *State v. Armstrong*, 94 Neb. 592; *Schlanbusch v. Schlanbusch*, 103 Neb. 588.

The questions argued in the supreme court upon the motion in the second appeal and upon the merits thereof, hav-

ing become moot questions, will not now be determined. The former order overruling that motion is therefore vacated and the second or present appeal dismissed at the costs of the receiver.

APPEAL DISMISSED.

STATE, EX REL. O. S. SPILLMAN, ATTORNEY GENERAL, V. DUNBAR STATE BANK: E. J. DEMPSTER, RECEIVER, APPELLANT: HENRY G. SEYFER ET AL., INTERVENERS, APPELLEES.

FILED APRIL 11, 1930. No. 26979.

Banks and Banking: APPEAL: AFFIRMANCE. Judgment allowing claims against the receiver of an insolvent state bank and an order requiring immediate payment of a dividend out of funds in his hands affirmed as being free from error.

APPEAL from the district court for Otoe county: JAMES T. BEGLEY, JUDGE. *Affirmed.*

C. M. Skiles, I. D. Beynon and *Albert S. Johnston,* for appellant.

Paul Jessen, Pitzer & Tyler and *D. W. Livingston, contra.*

HEARD before GOSS, C. J., ROSE, DEAN, GOOD, EBERLY and DAY, JJ., and LANDIS, District Judge.

ROSE, J.

This is a controversy between creditors of an insolvent state bank and the receiver over the allowance of claims.

In a proceeding by the state of Nebraska to wind up the affairs of the Dunbar State Bank, Henry G. Seyfer, Earl Seyfer, H. S. Westbrook and James Murray filed two claims each for $2,000, or $4,000 in all, and pleaded a preference requiring payment out of funds in the hands of the receiver, if sufficient, but, if insufficient, calling for payment of the remainder out of the bank guaranty fund. The receiver contested the claims. Upon a trial of the issues raised by the pleadings, the district court ordered the receiver to pay

interveners forthwith $784.70 out of bank assets or funds in his hands and allowed the remainder, or $3,295.30, as a claim against the bank guaranty fund. Afterward interveners applied to the district court for a peremptory order on the receiver requiring immediate payment of the $784.70 as allowed. From an order granting the application the receiver appealed.

In the supreme court interveners submitted a preliminary motion to dismiss the appeal. This was temporarily overruled. The case was subsequently argued and submitted on its merits.

Does the record disclose error? The judgment allowing the claims is based on two valid, unpaid certificates of deposit issued by the Dunbar State Bank for money received in the regular course of business while the bank was in actual operation as a commercial enterprise. Interveners are the claimants and the holders of the certificates of deposit. The deposits evidenced by the certificates were never withdrawn. The receiver retained in his hands funds equivalent to 22 per cent. of the claims, or $784.70, to pay an authorized dividend for that sum, in the event of their allowance, in common with other claims of the same rank. The pleadings and the proofs so show. The judgment allowing the claims and the peremptory order to pay the dividend are therefore free from error.

In view of the conclusion reached on the merits of the appeal, the preliminary ruling on the motion to dismiss is withdrawn.

AFFIRMED.

ROBERT E. JONES ET AL., APPELLANTS, V. JABE B. GIBSON ET AL., APPELLEES.

FILED APRIL 11, 1930. No. 27185.

Taxation: TAX SALE CERTIFICATE: FORECLOSURE: UNKNOWN OWNER: JURISDICTION. Where a deed to real estate has not been recorded by the purchaser thereof until after the institution of proceedings to foreclose a tax sale certificate thereon, under section 6092, Comp. St. 1922, and the plaintiff in such case filed

with his petition the required affidavit that the owner of the land is unknown, and cannot be found, and that he therefore made the land a party to the foreclosure action, the court thereby acquires jurisdiction thereof to proceed in the premises under the above act.

APPEAL from the district court for Dawes county: EARL L. MEYER, JUDGE. *Affirmed.*

E. D. Crites and *F. A. Crites,* for appellants.

Shurtleff & Spillman, contra.

HEARD before GOSS, C. J., ROSE, DEAN, GOOD, THOMPSON and EBERLY, JJ., and LIGHTNER, District Judge.

DEAN, J.

This is an injunction suit begun by Robert E. Jones and Jennie E. Jones, his wife, as plaintiffs, in the district court for Dawes county, wherein they sought to enjoin the defendants, Jabe B. Gibson, as owner of a tax sale certificate, and Vet Canfield, sheriff of Dawes county, from proceeding with the sale of 1,200 acres of land owned by plaintiffs pursuant to the provisions of a tax sale certificate under which the tax foreclosure suit was begun. From an order dismissing their petition the plaintiffs have appealed.

Plaintiffs obtained a mortgage deed to the 1,200-acre tract of land, which was made, executed, and delivered to them October 14, 1920, by the then owners of the land, namely, Benjamin A. Thornton and Elsie M. Thornton, his wife. And it is alleged that the mortgage deed was given to secure the payment of a certain promissory note in the principal sum of $9,000, executed by Thornton and his wife, and that the mortgage was foreclosed by the mortgagees as against the Thorntons, September 24, 1924, and, on May 5, 1926, the sale of the land was confirmed by the court. Subsequently, on appeal, the above judgment, November 29, 1927, was affirmed.

Gibson purchased the above tax sale certificate November 6, 1922, and began a foreclosure proceeding thereon October 10, 1927. In his petition he alleged that "the own-

er of the said real estate described in this cause of action is unknown and cannot be found and for that reason said real estate is made a party defendant to said action."

On the merits, Jones and wife, as plaintiffs, contend that the affidavit of defendant Gibson, to which reference is hereinafter made, is false and untrue, and they allege that they, as owners of the real estate in suit, appeared of record, and that the summons which was served on the Thorntons, then residing on the premises, had no force and effect as against the plaintiffs, and that the court was therefore without jurisdiction to proceed against the land. It may here be noted, however, that the record discloses that the plaintiffs did not appear of record as owners of the land until the filing of a sheriff's deed February 9, 1928, and that, as above noted, the defendant Gibson began the tax foreclosure proceeding October 10, 1927, which was about four months before the sheriff's deed was filed of record.

Defendant Gibson, in his brief, argues that, although the district court confirmed the sale of the land on application of the plaintiffs, pursuant to their mortgage foreclosure suit, the appeal of the mortgage foreclosure proceedings was then pending and undetermined in this court at or about the time defendant began the above proceeding, and that the owner of the land was therefore "unknown." It appears that the plaintiffs' deed was not recorded until February 20, 1928, and the tax foreclosure proceeding, as noted above, was begun October 10, 1927, and therein this averment appears, namely: "That the owner of the real estate above described and named as party defendant in said action, and each particular tract thereof, is unknown and cannot be found." Section 6092, Comp. St. 1922, provides:

"The plaintiff may also at his option make any or all of the parcels of land described in his petition a defendant, and, in case the owner of any such parcel of land shall be unknown and cannot be found, may proceed against the land itself, but in such case the service must be as in the case of a nonresident defendant."

In *Leigh v. Green*, 64 Neb. 533, we said: "When the owner of the land is not known to the holder of a tax certificate and cannot be found upon reasonable inquiry, the holder of such certificate may make the land a party to foreclosure proceedings; and in such case allegations in the petition and an affidavit for service by publication on information and belief, to the effect that the owner is unknown, are sufficient as against collateral attack."

And in a later case, namely, *Gwin v. Freese*, 90 Neb. 15, we held: "In an action to foreclose a lien for taxes, when the action is against the land itself, and the petition, duly verified, contains the allegation that the owner of the land is unknown, the court will not be without jurisdiction for want of such allegation in the affidavit for service by publication."

In the present case, of course, the affidavit of defendant did allege that the owner of the land was unknown. And where a deed to real estate has not been recorded by the purchaser thereof until after the institution of proceedings to foreclose a tax sale certificate thereon, under section 6092, Comp. St. 1922, and the plaintiff in such case filed with his petition the required affidavit that the owner of the land is unknown and cannot be found, and that he therefore made the land a party to the foreclosure action, the court thereby acquires jurisdiction thereof to proceed in the premises under the above act.

Plaintiffs allege that defendant's cause of action in the tax foreclosure suit is barred by the statute of limitations and that it was not brought within the statutory period named in section 6097, Comp. St. 1922, which provides:

"If the owner of any tax sale certificate shall fail or neglect to demand a deed thereon, or to commence an action for the foreclosure of the same within five years from the date of the sale, such tax sale certificate shall cease to be valid or of any force or effect whatever, and the real estate covered thereby shall be forever released and discharged from the lien of all taxes for which the same was sold."

As noted herein, defendant's tax sale certificate is dated

November 6, 1922, and he began foreclosure proceedings October 10, 1927, which was clearly within the time that would prevent the application of the statute of limitations from barring the beginning of an action to foreclose the tax lien against the land in suit. The five-year period allowed by the statute would not have expired for almost thirty days after the action was begun.

From an examination of the record and the law applicable thereto, we conclude that the judgment of the district court is right and must be and it hereby is in all things

AFFIRMED.

L. L. FOSTER, APPELLEE, V. J. C. HARTMAN, APPELLANT.

FILED APRIL 11, 1930. No. 26973.

1. **Evidence** examined and *held* insufficient to support the verdict.
2. **Guardian and Ward**: CUSTODY OF WARD. Unless licensed so to do by the state department of public welfare, a guardian is without authority to place out or give the care and custody of his minor ward to any person, other than temporarily.
3. ———: ———: PUBLIC POLICY. A contract by the terms of which a guardian attempts to give the custody and control of his 12 year old ward to another person until the minor shall have attained the age of 21 years, and by the terms of which contract the minor is to be sent to school, boarded and clothed until he shall have completed the high school course, and is thereafter to work and labor for the person with whom he has been placed until he shall have attained the age of 21 years, is contrary to public policy and void.
4. **Damages** are not recoverable for the breach of a void contract.

APPEAL from the district court for Franklin county: J. W. JAMES, JUDGE. *Reversed and dismissed.*

Bernard McNeny and *Thomas Robertson*, for appellant.

Byrum & Thompson, contra.

HEARD before GOSS, C. J., ROSE, GOOD, THOMPSON, EBERLY and DAY, JJ., and FOSTER, District Judge.

GOOD, J.

This action arose in the county court wherein plaintiff

filed a claim against the estate of Harold O. Pettite, a minor, for the sum of $1,061, for board, clothing and other items alleged to have been furnished to such minor. To this claim objections were filed by Hartman, the guardian. On hearing, the county court disallowed the claim. Plaintiff appealed to the district court and therein filed a petition in which he alleged, for his cause of action, that he had entered into an oral agreement with the guardian of the minor, by the terms of which plaintiff was to clothe and board the minor and send him to school until he had finished the high school course, and for his compensation the minor was to work for plaintiff until the minor had attained his majority. Plaintiff further alleged that after the minor had attained the age of 17 years and had finished the high school course he had, at the instance of his guardian, left plaintiff's home and employment and refused to carry out the contract.

That the cause of action set out in the petition in the district court is materially different from the claim filed in the county court is clearly apparent. The claim filed in the county court was one upon account. The petition in the district court is for damages for breach of contract. So far as the record discloses, that question was not brought to the attention of the district court. Issue was joined upon the petition, trial had, and verdict rendered in favor of plaintiff for $1,061, on which judgment was entered. The guardian brings the cause to this court to review the judgment.

That the verdict is not sustained by sufficient evidence and that the judgment is contrary to law are the only errors assigned that need be considered.

From the record it appears that plaintiff and the guardian entered into a written contract whereby plaintiff, for a stipulated sum, was to board and clothe the minor until he had attained the age of 12 years. This contract was carried out and the agreed compensation paid. Plaintiff's evidence tends to show that shortly after the minor became 12 years of age a further oral agreement was entered into between

plaintiff and the guardian, by the terms of which the minor was to remain in the home of the plaintiff, who was to clothe and send the minor to school until he had completed the high school course, and that for his compensation plaintiff was to retain the control and custody of the minor and have the benefit of his services until he had attained the age of 21 years. The guardian denies that he made any such oral agreement.

Conceding that such an agreement was made, let us examine the evidence to see if it is sufficient to support the verdict. The only evidence offered by plaintiff as to the amount that he should recover for the breach of the alleged contract is what he claims was the value of the board, clothing and other items which he furnished to the minor during the time that he was attending high school. If such a contract was made and if it is valid, the measure of plaintiff's recovery would be the value of the minor's services from the time he left the plaintiff's home until he attained his majority, less the reasonable cost of the minor's board and clothing. There is no evidence as to the value of such services or the cost or expenses of the minor's board and clothing during such period. The evidence is wholly insufficient to support any recovery.

A more serious question is presented, namely: Did the guardian have any power to make the alleged oral contract? Section 8265, Comp. St. 1922, so far as applicable, provides: "No person, other than a parent, shall place out, or give the care and custody of, any child, to any person or association, other than temporarily, unless such person shall be duly licensed by the department of public welfare under such rules and regulations as said department shall prescribe."

The contract would require the minor to perform, for a period of four years, services for the plaintiff without any designation as to the character of the labor to be performed, and would create a condition quite analogous to that known as peonage, which is denounced by the law of the nation. It would require four years of servitude to pay for the minor's board, lodging and clothing that had been previous-

ly furnished while he was attending high school. Whether such a contract would, strictly speaking, create a condition of peonage, it is unnecessary to determine. In any event, we are convinced that such a contract is not only forbidden by statute but is contrary to sound public policy, and is therefore void. Damages may not be recovered for the breach of a void contract.

The judgment of the district court is therefore reversed and the action dismissed.

REVERSED AND DISMISSED.

ELIZABETH B. CLARKE, APPELLANT, V. FRED P. MARCONNIT ET AL., APPELLEES.

FILED APRIL 11, 1930. No. 27126.

1. **Trusts**: SUFFICIENCY OF EVIDENCE. Evidence examined and *held* insufficient to establish a trust in lands conveyed to defendant by plaintiff's father.
2. **Deeds**: ALTERATION. A grantor cannot, by any act subsequent to the delivery of a deed, invalidate, alter or affect the instrument. 18 C. J. 217.

APPEAL from the district court for Nemaha county: JOHN B. RAPER, JUDGE. *Affirmed.*

Sterling F. Mutz, R. M. Switzler and *Edward C. Fisher*, for appellant.

Benjamin S. Baker, Ralph Wilson and *Lee Kelligar, contra.*

HEARD before GOSS, C. J., DEAN, GOOD, EBERLY and DAY, JJ., and CARTER and CHASE, District Judges.

GOOD, J.

This is a suit in equity in which plaintiff seeks to have certain deeds of conveyance, absolute on their face, decreed to have conveyed to the grantee the title to the lands therein described in trust for specified purposes. From an adverse decree, plaintiff appeals.

From the record the following pertinent facts appear: George Fred Marconnit and his wife, Mary, residents of Omaha, were the parents of two children, Elizabeth B. Clarke, plaintiff, and Fred P. Marconnit, defendant. In 1909 George Fred Marconnit executed a will, by the terms of which he bequeathed to his wife all of his personalty absolutely and to her devised the possession, rents, income and profits from all of his real estate during the term of her natural life. He devised to the plaintiff, subject to the life use of his wife, the homestead in Omaha, and to his son he devised the residue of his real estate, which consisted of about 835 acres of land, situate in Nemaha and Otoe counties. The latter devise required the son to pay to his sister the sum of $12,000, which was made a charge upon the real estate devised to defendant. In January, 1919, he added a codicil to his will which did not change the terms thereof, except change in the persons nominated to be executors of the will. Six months later he conveyed to his son, by warranty deed, the lands in Otoe and Nemaha counties. In 1924 he departed this life. His will was admitted to probate. The $12,000, mentioned in the will, was not paid by the son to his sister. Some years later Mary Marconnit, the widow, departed this life. This action was instituted by Mrs. Clarke, claiming that the deeds were intended to convey the title to the farms in trust to her brother for the following purposes: To constitute the grantee a trustee to assist in the management of the farms; to avoid payment of inheritance tax, and to divide the lands, after death of Mary Marconnit, between the grantee and plaintiff.

The evidence discloses without dispute that immediately after the deeds were executed, in July, 1919, they were delivered to the grantee, and that he has retained possession of them since that date. It also discloses that at the time of their execution the father stated that within a few days they would go to the farms, inform the tenants thereon of the change in ownership, and arrange with them for the transfer of their relations, as tenants, from the father to the

son. It also appears that within a short time after the deeds were executed the father and son went to Otoe and Nemaha counties, and there interviewed the tenants; that the father informed the tenants that he had transferred the lands to his son and that they should thereafter deal with him respecting the farms. The evidence discloses that from that time on the tenants dealt exclusively with the son and turned over to him the rents and income from the farms. It also appears that about two years after the deeds were executed Fred P. Marconnit opened a joint account in an Omaha bank in the name of himself and father; that at least a part of the rents and income from the farms and other items were deposited in this account; that both father and son were privileged to, and did, check against this account; the father for his individual support and use, and the son for the purpose of making investments by way of mortgage loans. It appears that when the father died there was in this account a sum in excess of $3,000; that the son, who was one of the executors of his father's will, listed the balance in this account as a part of the assets of his father's estate. It also appears that some time subsequent to his father's death Fred P. Marconnit informed plaintiff that he desired to carry out the provisions of his father's will, and that he was ready and willing to pay over to her the $12,000 therein provided, but for some reason the amount was not paid, perhaps because Mrs. Clarke was not satisfied at that time with the disposition that her father had made of his property, and perhaps in the belief that she was entitled to a share in the real estate which had been conveyed to her brother.

With respect to the allegation that the real estate was conveyed for the purpose of defeating an inheritance tax, it may be said that the proposition finds little support in the evidence. The only evidence which would lend any color to the contention is the fact that at the time of the conveyance the grantor was 65 years of age, and that at one time subsequent to the conveyances, in a conversation with a witness, he made a statement that his estate would

not be subject to an inheritance tax, as he had disposed of most of his property. There was no intimation that the disposition had been made for the purpose of evading payment of an inheritance tax. At that time he had an expectancy of approximately 10 or 11 years, and was apparently in fairly good health. There is nothing to indicate that he contemplated an early demise, or that the conveyances were made in anticipation of death. Under the rule announced in *In re Estate of Bronzynski*, 116 Neb. 196, the evidence was wholly insufficient to show that the conveyances were made in contemplation of death. We do not wish to be understood as here deciding that the property may not, in a proper proceeding, be subject to an inheritance tax, but only that the evidence in this case wholly fails to show that it was conveyed for the purpose of creating a trust to evade the provisions of the inheritance tax law.

Plaintiff further contends that the conveyances were made to enable the grantor to rid himself of the burdens of managing the farms. The contention is unsupported either by reason or by fact. The father could have placed the management of the farms in the care of the son without conveying title, and there is no substantial evidence indicating that such was the purpose of the grantor in making the conveyances.

The only evidence to support the charge that the conveyances were given with the intent of making the grantee a trustee to hold title until the death of his mother, and then to make an equal division of the lands between himself and the plaintiff, may be summarized as follows: First, the circumstance that the value of the property conveyed represented the major portion of the grantor's property; second, that the proportion of the property given to the grantee was greatly in excess of that which was given to grantor's daughter by his will; third, the act of the grantee in creating a joint bank account, on which both the grantor and grantee were permitted to draw; fourth, that grantor left unchanged the provision in his will for

a lien, in favor of plaintiff, on the lands devised to the son; and, fifth, a statement made by the grantor some two years after the date of the conveyances wherein he stated, in substance, that he did not desire the Clarkes (meaning his daughter's relatives by marriage) to have any part of his property, and that he could not help his daughter without helping her husband's relatives; that she would receive from $12,000 to $15,000, and no more, from his estate, and that she should receive only the income from this sum until she had reached the age of 45 years. At the time he made this statement grantor retained no property of any consequence, save and except the homestead which was devised to the daughter, subject to the life use by his widow, and perhaps a small amount of personal property which was also bequeathed to his wife. This statement, however, was not made in the presence of the grantee; nor is there any evidence of an agreement between the father and son that the latter should pay the $12,000 charge upon the real estate to the grantor's daughter. The statement does indicate that, in the mind of the grantor, the $12,000 should be paid by his son to his daughter. It is perfectly clear that if the son had taken title to the real estate under the will he would have taken it burdened with the charge therein provided; but it is equally clear that he did not take title under the provisions of the will, but under deeds, absolute in form, which contained no provision requiring him to make payment of any sum to his sister. It is a familiar rule that a grantor cannot, by any act subsequent to the delivery of a deed, invalidate, alter or affect the instrument. 18 C. J. 217. The statement made by the grantor, to the effect that his daughter would receive from $12,000 to $15,000 out of his estate, cannot affect the title to the real estate which he had previously conveyed. It seems reasonably apparent that he believed that the provisions in his will would operate to require his son to pay to his daughter the sum of $12,000. This was a mistaken conception of the law. If, as seems

apparent, it was the belief of the grantor that the daughter would receive from the son the sum of $12,000, it is unfortunate that he did not insert a provision therefor in the deeds and thereby make it a charge upon the land. Notwithstanding this may have been his belief and his intention, this court is powerless to change the effect of the deeds and to read into them something that the grantor did not take the precaution to insert. If the $12,000 is received by plaintiff, as, probably, intended by her father, it will be because the grantee, now knowing that it was the purpose and intent that he should do so, sees fit to carry out the wishes of his father, although he is not legally obligated so to do.

It is argued by plaintiff that, because defendant caused a joint account of defendant and his father to be opened in a bank, into which account defendant paid a part of the rents and income from the farms, this fact shows that the lands were conveyed in trust. This contention cannot be sustained. The money placed in this account was the property of the defendant. It was his to do with as he saw fit. He could have given it to his father absolutely, or to any one else, and he could have placed it in any bank he desired and permitted his father, or any one else, to draw upon it if he so chose. It is probable that, realizing that his father had been generous and liberal with him, he felt it proper to be generous and liberal with his father.

The trial court found, among other things, that while the deeds took effect from the time of their delivery there was an agreement or understanding between the grantor and the grantee that the bequest of $12,000 to the plaintiff, made in the will of the grantor, should be carried out and paid by the grantee, but that, notwithstanding such understanding, the trial court was without jurisdiction to award such bequest or to decree any charge or lien on the land by reason thereof. This particular finding we think is not warranted by the evidence; nor do we agree to the proposition of law that the court was without jurisdiction,

The judgment of the district court denying relief is right, notwithstanding the particular finding and conclusion of law, and it is, therefore,

AFFIRMED.

DEAN, J., dissenting.

I do not agree with the conclusions expressed in the main opinion. It appears to me that the terms of the will of the senior Marconnit provided that the plaintiff shall inherit the homestead, which was of the approximate value of $4,000, and that when plaintiff reached the age of 45 years she should receive the sum of $12,000 from the estate. When the suit was tried plaintiff was past the age of 45 years, but she had never received any part of the $12,000 bequest. The will provides that the son shall inherit certain real estate, but that it shall be subject to the payment to plaintiff of the $12,000, which was bequeathed to her by her father and which was made a specific charge against the real estate. The following provision is in the will. "For the purpose of carrying out the terms of this bequest I hereby give, bequeath and devise unto my said executors hereinafter named (the testator's widow and his son Fred) the said sum of twelve thousand ($12,000) dollars upon the terms and conditions stated in this item of my will. * * * My said executors hereinafter named shall hold said twelve thousand ($12,000) dollars and invest the same as above provided until my said daughter Lizzie Clarke reaches the age of forty-five (45) years."

Some time in July, 1919, the senior Marconnit purported to convey certain farms located in Nemaha and Otoe counties to the defendant. This was six years before his death. The will was written in 1909, and was ratified and confirmed in a codicil which was executed ten years thereafter, namely, in 1919, that being the same year in which the deeds were executed. The defendant, however, testified that he did not have the above named deeds recorded until the year after the death of his father, namely, in 1925, nor did he tell his sister about the deeds until several weeks

after his father had passed away. Clearly the defendant appears to have recognized his sister's rights. I submit that the real estate should be held subject to the $12,000 bequest and that it was the intention of the senior Marconnit that the defendant should inherit such real estate subject to the payment of $12,000 to his sister, the plaintiff herein.

CORNELIA NORTON V. STATE OF NEBRASKA.

FILED APRIL 11, 1930. No. 27297.

1. **Receiving Stolen Goods.** The receiving or concealing of stolen hogs, knowing them to have been stolen, with intent to defraud the owner, is by section 9611, Comp. St. 1922, made a substantive crime, and a conviction therefor may be had without regard to the person who stole the hogs, or the person from whom they were received.
2. ———: "CONCEALS:" INTENT. The word "conceals," as it appears in that part of section 9611, Comp. St. 1922, reading as follows, "or conceals any sow, barrow, boar or pig, knowing the same to have been stolen," covers and includes the words "with intent * * * to defraud the owner."
3. **Criminal Law:** EVIDENCE: WEIGHT: QUESTION FOR JURY. Where the evidence in a criminal case is acutely conflicting, and from its consideration different minds may reasonably arrive at different conclusions, the weight to be given thereto is a question for the jury.
4. ———: VERDICT. It is not necessary that the name of defendant in a criminal case appear in the body of the verdict, other than as defendant, where in the caption thereof he is designated by his proper name with the word "defendant" immediately following it.
5. ———: INSTRUCTIONS. "Where the charge to the jury, considered as a whole, correctly states the law, the verdict will not be reversed by the appellate court merely because a single instruction, when considered separately, is incomplete." *Samuels v. State*, 101 Neb. 383.
6. **Record** examined, and found without error prejudicial to defendant.

ERROR to the district court for Dawson county: ISAAC J. NISLEY, JUDGE. *Affirmed.*

M. O. Bates and *Neil France,* for plaintiff in error.

C. A. Sorensen, Attorney General, and *Clifford L. Rein, contra.*

Heard before GOSS, C. J., DEAN, GOOD, THOMPSON and DAY, JJ., and FITZGERALD and L. S. HASTINGS, District Judges.

THOMPSON, J.

The plaintiff in error, hereinafter called defendant, was informed against and convicted of receiving and concealing stolen hogs, of some value, knowing the same to have been stolen, with intent to defraud the owner, under section 9611, Comp. St. 1922. Such section provides: "Whoever steals any sow, barrow, boar or pig of any value, or receives or buys any sow, barrow, boar, stag or pig that shall have been stolen, knowing the same to have been stolen, with intent by such receiving or buying to defraud the owner, or conceals any such thief, knowing him to be such, or conceals any sow, barrow, boar or pig, knowing the same to have been stolen, shall be imprisoned in the penitentiary not more than five nor less than one year and shall pay the costs of prosecution."

For reversal numerous claimed errors are presented, which will receive consideration as reached.

At the outset we might state that the receiving or concealing of stolen hogs, knowing them to have been stolen, with intent to defraud the owner, is by the aforesaid section 9611 made a substantive crime, and a conviction therefor may be had without regard to the person who stole the hogs, or the person from whom they were received. *Levi v. State,* 14 Neb. 1; *Ream v. State,* 52 Neb. 727; *In re Loomis,* 84 Neb. 493; Maxwell, Criminal Procedure (2d ed.) pp. 383 to 387, and authorities therein cited.

Further, the word "conceals," as it appears in that part of section 9611, Comp. St. 1922, reading as follows, "or conceals any sow, barrow, boar or pig, knowing the same to have been stolen," should be given the same meaning as if

followed by the words "with intent * * * to defraud the owner." In *Bailey v. State,* 115 Neb. 77, in construing this same word as it appears in a similar clause of section 9612, Comp. St. 1922, relating to poultry stealing, we concluded that the word "conceal," as there used, covered and included the words "with intent * * * to defraud the owner." This is a logical conclusion, as in law the word "conceal" ordinarily implies design or purpose.

An error stressed in the briefs, and at oral argument, is that the judgment is without supporting evidence. The bill of exceptions, consisting of some 249 pages, has been carefully read and considered. The evidence is, in many material portions thereof, acutely conflicting, and in other parts uncontradicted or admitted, from a consideration of all of which different minds may reasonably arrive at different conclusions. In such a case, we are controlled by *Dore v. Omaha & C. B. Street R. Co.,* 97 Neb. 250, wherein it is held: "The jury are the judges of the credibility of witnesses who testify before them and of the weight of their testimony, when properly admitted, and, unless the decision of the jury thereon is clearly wrong, their verdict will not be molested." Under this record, we cannot say, and do not find, that the verdict of the jury is without support in the evidence, nor that the same is clearly wrong.

It is submitted that the verdict is contrary to law, owing to its uncertainty as to the person found guilty. The verdict recites:

"In the District Court of Dawson County, Nebraska. State of Nebraska, Plaintiff, v. Cornelia Norton, Defendant. State of Nebraska, County of Dawson, ss. Verdict of Jury. We, the jury duly impaneled and sworn in the above entitled cause, do find the defendant guilty in the manner and form as charged in the information. That at the time of receiving or concealing of said hogs by the defendant they were worth $125.00. (Signed) Oswald A. Kutz, Foreman."

It will be noticed that in the caption of such verdict the words "Cornelia Norton" are followed by the word "De-

fendant," and the verdict finds the "defendant" guilty. We may further note that she was so designated in the information referred to in this verdict, also in numerous of the instructions given by the court, as well as in the title of the instructions, which were submitted by the court, carried to the jury room, and before the jury at the time of their deliberations and finding. These facts, considered in connection with the verdict, bring it clearly within the rule of construction announced in *Keeler v. State*, 73 Neb. 441, as follows: "Verdicts in criminal cases should be certain and import a definite meaning free from ambiguity. If the meaning of the verdict in the light of the whole record is clear, beyond any reasonable doubt, it is sufficient." In the course of the opinion in the *Keeler* case, *Williams v. State*, 6 Neb. 334, relied upon by defendant, is considered and distinguished, and, as we conclude, properly so.

Other claimed errors of law, both as to instructions and those occurring at the trial, are also urged as grounds for reversal. These have had our consideration. Some of the challenged instructions, if viewed independently, may be incomplete, but when considered in connection with the others given, which we must do under this record, they fairly submit to the jury the issues involved. *Samuels v. State*, 101 Neb. 383; *Williams v. State*, 115 Neb. 277.

The defendant has had a fair trial, and no substantial miscarriage of justice has actually occurred; hence, the provisions of section 10186, Comp. St. 1922, are controlling herein.

No error prejudicial to the rights of the defendant appearing in the record, the judgment of the district court is

AFFIRMED.

CLIFFORD D. MARSHALL, APPELLANT, V. EDWARD W. ROWE ET AL., APPELLEES.

FILED APRIL 18, 1930. No. 27159.

Judgment: SATISFACTION: PETITION TO SET ASIDE: SUFFICIENCY. In an action by a judgment creditor to set aside a satisfaction

of judgment made for less than the amount due on the judgment but alleged to have been procured by the judgment debtor by fraudulent misrepresentations of fact as to his property, and where all the necessary elements of fact are pleaded by the creditor and demurred to by the debtor, the demurrer should be overruled.

APPEAL from the district court for Lancaster county: FREDERICK E. SHEPHERD, JUDGE. *Reversed.*

Walton B. Roberts, Marcus L. Poteet and *Prince & Prince*, for appellant.

John J. Ledwith and *Horth, Cleary & Suhr, contra.*

Heard before GOSS, C. J., ROSE, DEAN, GOOD, THOMPSON and DAY, JJ., and LIGHTNER, District Judge.

GOSS, C. J.

Plaintiff appeals from the judgment of the district court sustaining separate demurrers of the defendants.

To make clear the situation, it is necessary to state plaintiff's pleading rather fully. The pleading to which the defendants demur was a motion filed in the original case in which the judgment was entered in the district court for Lancaster county and was entitled "Motion to set aside satisfaction of judgment." The motion consisted of twelve paragraphs and was duly verified. It had all the forms of a petition. In the final order herein, on plaintiff's refusing to plead further and "electing to stand upon his petition, the court accordingly orders that plaintiff's petition and cause of action be and hereby is dismissed." The motion was filed September 24, 1928. It alleged that on or about April 28, 1915, plaintiff obtained in this action a judgment for $2,000 and costs against the defendants and that the judgment was affirmed on or about April 2, 1917, in the supreme court; that execution was issued on April 26, 1917, out of the district court for Lancaster county and on May 4, 1917, returned unsatisfied, for want of property of either defendant on which to levy; that on April 27, 1917, a transcript of the judgment was duly filed in the

office of the clerk of the district court for Hall county, Nebraska, execution was issued thereon, and on May 7, 1917, it was duly returned as unsatisfied, for want of any property on which to levy; that about 1915, while the action was pending in the district court for Lancaster county, the defendant McGrath purchased a described quarter section of land in Hall county, Nebraska, and received a warranty deed therefor, but the grantee's name was given in said deed as Susan E. McGrath, wife of the said defendant; that he had caused the deed to be put in his wife's name for the purpose of hindering, delaying, preventing and defrauding the plaintiff in the enforcement and satisfaction of his judgment, but that the said wife took title without consideration and held it in trust only for her said husband; that on or about May 8, 1917, plaintiff commenced an action in equity against the defendant McGrath and his wife to subject said real estate to the payment of said judgment; that the defendants therein filed an answer, which answer was not verified, denying each and every allegation contained in plaintiff's petition; that the plaintiff by his attorney filed a motion to strike the answer for the reason that it was not verified, the motion was sustained, and thereupon the defendant Benjamin R. McGrath filed a duly verified answer, denying each and every allegation contained in plaintiff's petition, and plaintiff alleges that said sworn statement was false and was known at the time by said defendant to be false and that said defendant knew at the time that he was the owner of the real estate and that it was held in trust by his wife solely as trustee for said defendant; that plaintiff was unable to disprove said statement, relied upon it and believed it to be true, and therefore accepted the sum of $1,500 in settlement of said judgment, which was then approximately $3,000, principal, interest and costs; that the settlement was obtained solely and only by the fraudulent statements heretofore referred to and that the release of said judgment was totally without consideration and void; that plaintiff did not know and had no means of discovering that said statements were

false, until about the 31st day of August, 1926, the said defendant McGrath having filed a petition in the district court for Hall county in which he sought to hold the said Susan E. McGrath as trustee of said real estate, and on a hearing thereof on the 20th day of August, 1926, the said McGrath testified that his wife had been at all times since 1914 the owner of record of said real estate, holding the legal title solely in trust for him. Plaintiff alleges that he did not know of the fraud until November 25, 1926, and that immediately upon the discovery of said facts he commenced an action in the district court for Hall county, Nebraska, and filed a motion in this case to revive the judgment. The plaintiff prayed, among other things, that the satisfaction be set aside and that defendants have credit for the amount paid as and when paid. The exact words of the satisfaction are not pleaded, but plaintiff alleged that the satisfaction shows on its face that the sum of money which plaintiff recovered was less than the amount due upon the judgment and that the release of the balance remaining unpaid was without consideration and void. There was no motion by defendants to make this pleading more specific.

Defendants separately demurred to this pleading on the grounds (1) that the court had no jurisdiction of the person of the defendant or subject-matter, (2) that there is another action pending between the same parties for the same cause, (3) that there is a defect of the parties defendant, and (4) that the motion does not state facts sufficient to constitute a cause of action or entitle the plaintiff to the relief prayed for.

The above four grounds of demurrer are among the six grounds provided in our Code. Comp. St. 1922, sec. 8610. But this section provides that none of these grounds are permitted to be set up by demurrer except when they appear on the face of the petition.

The court had jurisdiction of the person of each of the defendants because each defendant demurred and thereby appeared generally; it had jurisdiction of the subject-mat-

ter—to pass on the validity of a satisfaction of judgment alleged to have been procured by fraud—at least as between these, the same parties as in the original action, and where no intervening rights of innocent third parties are affected. Nor does it appear from the petition that there is another action pending between the same parties for the same cause. The "cause" here is to set aside the satisfaction of judgment. This disposes of the first two grounds of the demurrers. The record does not indicate the reasons of the district court for sustaining the demurrers, but it is evident they could not have been based on the grounds already mentioned.

On the question of procedure both parties cite *Fox v. State*, 63 Neb. 185; the appellant citing it as authority for the proposition that a motion filed in the original case is a proper procedure to cancel a satisfaction procured by fraud; the appellee citing it on the proposition that, where there is a conflict in the evidence, parties seeking relief should be left to an independent action. The opinion in that case was written by Pound, C., and approved by the court. It provides, citing authorities, that, generally, where a satisfaction of judgment has been procured by fraud or mistake, the proper course is to apply to the court in which is the record of the judgment by motion to set aside such satisfaction. But if rights of others, not parties to the original action, have supervened or would be unduly affected, or if the evidence is conflicting on material questions of fact arising upon the motion, the party seeking relief should be left to an independent action. *Knaak v. Brown*, 115 Neb. 260, 267, citing numerous authorities, is to the same general effect. It so happens in the present state of the instant case that the demurrers admit that there is no conflict of fact between the parties. It also appears, as before indicated, that the suit involves only the same original parties, and, while the pleading of the appellant is styled a motion, it is in form and substance an independent petition. In the order of dismissal the district court aptly called it a petition. The appellees might have

attacked it by motion to make its allegations of fact more specific or in any way an ordinary petition might be attacked, or they might have set up their defenses by answer. They chose to demur, and so we must consider that, for the present purposes, the suit was properly brought.

The appellees presented an able oral argument and submitted a strong brief in support of the judgment sustaining the demurrers; but on examination of the record we find they have taken facts for granted as appearing in the record before us which may appear in the previous history of the case or cases but which we cannot find in the record here. Unless these matters appear in the record they do not aid the demurrers. We believe we have faithfully stated the contents of the motion and of the record. Among the instances where the appellees state as facts upon which they ground their argument for affirmance but which we cannot take as facts in our review, because we cannot find them in the record, are the following: First, a rather complete history of a creditor's bill filed against the McGraths in Hall county in 1917, and a statement that it was dismissed with prejudice by Marshall; second, likewise a rather complete synopsis of another suit brought by Marshall for the same cause in the district court for Hall county on December 9, 1926, resulting, it is claimed, in a final judgment on demurrer in favor of McGrath on March 21, 1928; third, that the satisfaction of judgment involved here was "under seal, having been acknowledged by judgment creditor before a notary public and placed of record;" and, fourth, that the defendants are doctors, that the original judgment was obtained against them on a charge of negligence in a certain nose operation and that they were joint tortfeasors.

Under section 8512, Comp. St. 1922, a cause of action for relief on the ground of fraud shall not be deemed to have accrued until the discovery of the fraud. Such an action must be commenced within four years after discovery of the facts constituting the fraud, or of facts sufficient to put a person of ordinary intelligence upon an inquiry which

if pursued would lead to such discovery. *Parker v. Kuhn,* 21 Neb. 413; *Coad v. Dorsey,* 96 Neb. 612; *Hanna v. Bergquist,* 102 Neb. 658. Taking as true the allegations of the petition, this suit was begun in time.

The real crux of the case is whether the representations inducing the satisfaction of the judgment for a consideration less than the amount due was fraudulent or might as a matter of fact be found or considered fraudulent in the circumstances. We have to take as true the fact in substance that the Hall county land in Mrs. McGrath's name belonged to her husband and that in his answer to Marshall's petition to uncover the title McGrath denied that fact. The general denial is not to be considered in this phase of the question so much from its technical aspect as a pleading but rather as to what it imported in the way of truth in the light of a consequent settlement between the parties without a legal contest of the issues presented by the general denial. Whether or not a general denial need be verified in such a case or whether it strengthened the representation when the general denial was verified and filed we do not decide. What difference does it make whether he made the representation orally or in a letter or in a pleading? But it can readily be understood, if McGrath had admitted the fact, as he now admits it by demurrer, that he was indeed the real owner of the land, it is likely that Marshall would not have accepted so inadequate a sum in satisfaction of a judicially liquidated debt. The inference might follow that Marshall was induced to accept the representation and act upon it. So when Marshall alleged as a fact in these proceedings that he relied on this representation so made and the defendants admit by demurrer that he so relied, that becomes the admission of a pleaded fact.

Lastly, it is claimed in the argument by appellees that there is no ground alleged to justify Marshall in having the satisfaction set aside as to Rowe; that therefore the judgment will remain satisfied as to Rowe, if Marshall get what he asks for, and reinstated as to McGrath; that Mc-

Grath was always entitled to contribution from Rowe, and, if Marshall succeeded, McGrath will be deprived of this substantial right of contribution. Reference to the petition shows that Marshall "accepted the sum of $1,500 in settlement of said judgment," but we are unable to find therein any statement of the fact that McGrath alone paid it. Where they were jointly liable we cannot assume that both did not contribute to the amount paid. It may be that the form of the satisfaction, or some other receipt, or the facts that might be produced on complete issues of fact and a trial thereon, would indicate who actually paid the amount or how the parties contributed, if at all. On the record we do know that the judgment was satisfied with much less than full payment of the amount due. The representations of McGrath as to his property appear to have been the inducement to the judgment creditor to accept less than full payment. It seems to be the rule that payment of a judgment by one of two joint debtors operates as a satisfaction and extinguishment of the judgment as to both. 34 C. J. 689, sec. 1062. But there was no payment in full of the judgment here. "Whatever mode of procedure is pursued to cancel the record of the satisfaction of a judgment, the remedy sought is governed by equitable rules, the ultimate question being whether it is inequitable for the person relying thereon to avail himself of the entry of satisfaction." 15 R. C. L. 831, sec. 302. In the circumstances and as the record stands, Rowe cannot claim the advantage arising out of the representations of McGrath.

For the reasons stated, the judgment of the district court is reversed and the cause remanded.

REVERSED.

SECURITY STATE BANK, APPELLEE, V. J. F. SCHOMBERG, APPELLANT.

FILED APRIL 18, 1930. No. 27157.

1. **Chattel Mortgages: LIEN: CONSTRUCTIVE NOTICE.** The rule that a chattel mortgage on a growing crop is not constructive notice of a lien on the harvested product, when offered for sale

in the open market, does not necessarily apply to a chattel mortgage on a growing crop and also on the harvested crop.

2. ———: REGISTRATION. As between the mortgagee and the mortgagor named in a duly executed chattel mortgage the registering of the instrument in the proper public office is immaterial.

3. ———: DESCRIPTION OF PROPERTY. "A description in a chattel mortgage which will enable a third person, aided by inquiries which the instrument itself suggests, to identify the property is sufficiently definite." *Farmers & Merchants State Bank v. Sutherlin*, 93 Neb. 707.

4. ———: ———. The rule that a chattel mortgage enabling a third person, aided by inquiries suggested by the instrument itself, to identify the mortgaged property is sufficiently definite applies to chattel mortgages on growing crops.

5. ———: ———. As described in the opinion, the contents of a registered chattel mortgage on growing grain and also on the matured crop, whether "in the field, in cribs or bins, in elevator or any other place," *held* sufficient to suggest to a third person inquiries which, if pursued, would elicit knowledge that such grain, when delivered by the mortgagor at an elevator and sold by him there, was incumbered by the lien of the chattel mortgage.

6. **Banks and Banking**: AUTHORITY OF CASHIER: CHATTEL MORTGAGES. A cashier who exercises authority to notify a purchaser of grain at an elevator that the grain is mortgaged to the bank and enters into an agreement that a check for subsequent purchases of the mortgaged grain not yet sold shall be drawn jointly in favor of mortgagor and mortgagee may bind the bank by that arrangement.

7. **Trial**: PEREMPTORY INSTRUCTION. Where the pleadings and proofs are sufficient to sustain a verdict in favor of defendant, a peremptory instruction against him is erroneous.

APPEAL from the district court for Pierce county: DE WITT C. CHASE, JUDGE. *Reversed.*

M. H. Leamy, for appellant.

Douglas Cones and *Allen Ardell, contra.*

Heard before GOSS, C. J., ROSE, DEAN, THOMPSON, EBERLY and DAY, JJ., and LIGHTNER, District Judge.

ROSE, J.

This is an action to recover $755.90 for conversion of

mortgaged corn and oats. To secure an indebtedness of $4,545.10 the chattel mortgage was executed June 9, 1927, and was a lien on live stock, farming implements, crops and other personal property in Pierce county. The crops were then growing on a half section of land definitely described in the chattel mortgage—land on which mortgagor was a tenant. He owned specified shares of the growing crops for the year 1927 and had 165 acres of corn and 110 acres of oats. The chattel mortgage contained recitals that he was in possession and that the lien included also "the matured crops of growing grain," whether "in the field, in cribs or bins, in elevator or any other place." The chattel mortgage was in proper form, was specific in describing the property, was duly filed in the office of the county clerk of Pierce county and was indexed on the public records. The Security State Bank of Osmond was mortgagee and is plaintiff herein. A. J. Konvalin was the mortgagor and the tenant occupying the land on which the crops were growing. After they matured his shares were separated on the premises from the shares of the landlord. Beginning September 30, 1927, and ending January 26, 1928, the mortgagor and tenant sold to J. F. Schomberg, defendant, at eleven different times, mortgaged corn and oats amounting in value to $755.90 and received the proceeds. To the extent of $2,231.27 the secured debt remained unpaid. The grain sold was delivered by mortgagor to defendant at the latter's elevator in McLean, a village within two miles of the farm on which the mortgaged corn and oats grew. Plaintiff alleged in its petition that defendant, with knowledge of the incumbrance, wrongfully received and converted the grain without the consent of plaintiff to the latter's damage in the sum of $755.90.

Defendant inserted in his answer a general denial of unadmitted allegations of the petition, and pleaded further that he had no knowledge or notice of the chattel mortgage; that plaintiff notified him, January 24, 1928, it had a lien on the crops described in the petition; that plaintiff then agreed with him to deduct from the purchase price of mort-

gagor's subsequent deliveries of the 1927 crops the amount of an account owing by mortgagor to defendant; that pursuant to such agreement defendant thereafter, January 26, 1928, received from mortgagor 679 bushels and 26 pounds of corn, deducted from the purchase price $124.50, the sum of the account mentioned, and drew a check payable to mortgagor and plaintiff for $317.15, the remainder of the proceeds; that the check is in the possession of plaintiff.

The reply to the answer was a general denial.

Upon a trial of the issues the district court directed a verdict in favor of plaintiff. From a judgment against defendant for $792.10 he appealed.

The order directing the verdict in favor of plaintiff is challenged as erroneous. Under this assignment it is argued that the chattel mortgage was not a lien on the grain when offered for sale in the open market at the elevator and that therefore defendant was not liable for conversion. In support of this proposition defendant relies on the following principle of law:

"A chattel mortgage upon growing grain is not constructive notice to third parties of a mortgage on the same grain thereafter lawfully placed in crib or bin; and a dealer in grain who in good faith in open market purchases such grain from the mortgagor, and receives it at his warehouse, will take it free from the lien of the mortgage." *Gillilan v. Kendall & Smith,* 26 Neb. 82.

Referring to this ruling in a later case the court said:

"It was held in *Gillilan v. Kendall,* 26 Neb. 82, contrary to the rule in other jurisdictions, that a chattel mortgage on a growing crop is not constructive notice of a lien upon the harvested product when offered for sale in the open market. We adhere to the principle announced in that decision." *Chicago Lumber Co. v. Hunter,* 58 Neb. 328.

In the latter case, however, the report shows that the crop was mortgaged as growing corn and that the contract of purchase was made while it was on the stalk in the field and it was held that the registered chattel mortgage imparted to the purchaser constructive notice of the lien.

An examination of the opinion in *Gillilan v. Kendall & Smith*, 26 Neb. 82, shows that it does not sustain the position of defendant herein, for the reason that the chattel mortgage there considered was confined by its terms to a lien on growing corn, while in the present instance the lien covers growing grain and "matured crops" whether "in the field, in cribs or bins, in elevator or any other place."

In support of the peremptory instruction plaintiff cites *Eigbrett v. State*, 111 Neb. 388, but that case is not in point. In a criminal prosecution Eigbrett was accused of selling mortgaged property in violation of law. He was the mortgagor and had actual knowledge of the lien. As between him and the mortgagee, the lien on the growing crop extended to the harvested grain which he unlawfully sold, the parties having intended to secure the debt by a lien on the matured crop. In the present case the purchaser in the open market was not a party to the chattel mortgage and he was without actual knowledge of the lien.

Independently of the cases cited by the parties the question now to be determined is: Did the registered chattel mortgage impart to defendant constructive notice that the grain was incumbered by a chattel mortgage? The rule in Nebraska has been stated thus:

"A description in a chattel mortgage which will enable a third person, aided by inquiries which the instrument itself suggests, to identify the property is sufficiently definite." *Farmers & Merchants State Bank v. Sutherlin*, 93 Neb. 707.

This rule applies to growing, mortgaged crops. 11 C. J. 468, sec. 96. A general principle has been stated in this form:

"The description of a crop is sufficient if it be such that a prudent, disinterested person, aided and directed by such inquiries as the instrument itself suggests, is able to identify the property." 11 C. J. 468, sec. 96.

What is sufficient to suggest inquiries is indicated by the following rule:

"A mortgage covering all or the entire crop of the mort-

gagor, taken in connection with the mortgagor's residence or the location of the land on which it is to be grown, is ordinarily sufficient to suggest such inquiries." 11 C. J. 468, sec. 96.

A copy of the chattel mortgage was on file in the office of the county clerk. What the public record disclosed was constructively imparted to defendant. If the chattel mortgage itself did not give him constructive notice that the grain delivered at his elevator by mortgagor was incumbered, it suggested inquiries which, if pursued, would have elicited knowledge of the lien. Defendant had an opportunity for inquiry every time mortgagor delivered a load of grain at the elevator. The chattel mortgage suggested inquiry by stating definitely the name of mortgagor; by describing in technical language the land occupied by him as tenant; by naming the mortgagor and the mortgagee; by specifying the different kinds of crops growing on the land described and the acreage of each; by reciting the indebtedness secured; by extending the lien on growing crops to the matured grain, whether "in the field, in cribs or bins, in elevator or any other place;" by indicating that the growing crops were within two miles of defendant's elevator. It is a fair inference that a simple inquiry directed to either party to the chattel mortgage would have elicited knowledge of the lien with resulting protection to both the mortgagee and the purchaser. In this view of the record absence of notice was not a defense.

On another ground, however, the order directing a verdict in favor of plaintiff was erroneous. The evidence was sufficient to present a question for the jury on the issue that plaintiff gave defendant actual notice of the lien January 24, 1928, and that, pursuant to an agreement between them on that date, defendant, two days later or on January 26, 1928, received 679 bushels and 26 pounds of the mortgaged corn, deducted from the purchase price $124.50 due him from mortgagor, drew a check jointly in favor of mortgagor and plaintiff for $317.15, the remainder of the proceeds, and delivered it to mortgagor. Under the agree-

ment plaintiff made mortgagor its agent to receive the check. The evidence shows that the check was in possession of plaintiff at the time of the trial. Defendant testified positively to the outlined facts. There was sufficient testimony to support this defense. For the purpose of testing the peremptory instruction on appeal the testimony of defendant on this issue is conclusive. At least to the extent of the two items mentioned, $124.50 and $317.15, or $441.65, defendant made a defense for the consideration of the jury.

The evidence shows that the agreement under consideration was made by defendant and the cashier of plaintiff, a banking corporation. In this connection plaintiff contends that the directors of the bank were its managers and argues that the cashier had no authority to bind it by such an arrangement. In entering into the agreement defendant was entitled to rely on the following statement of the law as recently adopted:

"While a cashier of a bank is presumed to have all the authority he exercises in dealing with executive functions legally within the powers of the bank, or which are usually done, or held out to be done, by such an officer, still the test is whether the transaction is with the bank and in its business, or with the cashier personally and in his business. As to the former, all presumptions are in favor of its regularity and binding force. As to the latter, no such presumptions arise." *Division No. 1, Railway Employees' Department, A. F. L., v. American State Bank,* 113 Neb. 196.

The first actual notice of the mortgage was given directly by the cashier. The action in tort had not been commenced. The cashier was acting for the bank and not for himself personally. The business in hand was the bank's business. The cashier had authority to accept a partial payment on the secured debt and to reduce the lien to that extent. The check that he agreed to accept was issued for the proceeds of mortgaged corn and was equivalent to a payment of $317.15 on the debt secured by the chattel mortgage. The bank was a beneficiary in the transaction. Before the agreement was made defendant's purchases of

the mortgaged grain amounted in value to $314.25 only. Thereafter he was induced by the agreement to make additional purchases of corn aggregating in value $441.65. Under the circumstances defendant had a right to assume that the cashier had the authority he exercised in the name of the bank. Defendant's part in the transaction was not precarious enough to outlaw the defense pleaded and proved.

The instruction directing the verdict in favor of plaintiff was prejudicially erroneous and for that reason the judgment of the district court is reversed and the cause remanded for further proceedings.

REVERSED.

IN RE ESTATE OF LIZZIE FRELING.
C. C. HAYNES, APPELLEE, V. ROY W. MATSON, EXECUTOR, APPELLANT.

FILED APRIL 18, 1930. No. 27136.

1. **Homestead**: LIFE ESTATE: RIGHTS OF CREDITORS. Where a spouse, on the death of her husband, succeeded to a life estate in a homestead, upon her death such life estate became extinct and also, as well, the rights of her common creditors as to such homestead.
2. **Executors and Administrators**: DUTIES. An executor of the estate of a deceased person, owning both lands and personal property at the time of his death, is chargeable with the duty of acquainting himself with the title to such real estate and personal property and of enforcing an accounting thereof as against all persons who may be in adverse possession thereof or who may claim an adverse title or interest therein as against such estate.
3. ———: ASSETS. "All the chattels of the deceased, wherever situated, are assets, if the representative, by reasonable diligence, considering the means of the estate already under his control, might have possessed himself of them." 2 Schouler, Wills (5th ed.) sec. 1209.

APPEAL from the district court for Douglas county: CHARLES E. FOSTER, JUDGE. *Affirmed in part, and reversed in part.*

W. A. Ehlers, for appellant.

B. N. Robertson, contra.

HEARD before GOSS, C. J., DEAN, GOOD, EBERLY, and DAY, JJ., and FITZGERALD and HASTINGS, District Judges.

DEAN, J.

Lizzie Freling, a widow, died in Douglas county. By the terms of her will she devised her property to Eugene R. Freling, her legally adopted son, who was then 20 years of age. Roy W. Matson was named in the will as executor and, shortly after Mrs. Freling's death, he qualified as such executor and assumed the duties pertaining thereto. In his final report, which was approved by the county court, Matson alleged that the personal property was insufficient to pay the costs of administration and that the estate was without funds to pay certain claims theretofore allowed by the county court. C. C. Haynes, the undertaker in charge of the funeral and burial obsequies, is the plaintiff herein and he has filed objections to the above final report of the executor. Haynes' claim in the sum of $352.50 for funeral expenses was duly allowed by the county court and he rightfully contends, and it is clearly disclosed, that his claim is a valid and subsisting claim against the estate. Haynes charges that the report of the executor fails to disclose the disposition that was made of the real estate, or any part thereof. And, pursuant to Haynes' appeal in the district court, the order of the county court, approving the final report of the executor, was there reversed. Thereupon the following stipulation was entered into by the parties:

"It is stipulated by and between the parties hereto that the copy of the petition for discharge and the final account, in the estate of Lizzie Freling, deceased, and the copy of objections and exceptions to the petition for discharge and final account shall constitute the pleadings in this case; that the trial herein shall be upon such copies, in so far as they relate to the pleadings. It is further stipulated that both parties hereto may at any time apply to the court for leave to amend such copies either before or during the trial of the cause in the district court."

From the judgment rendered by the district court, the executor has prosecuted an appeal to this court.

The district court found and decreed that the estate in question consisted of an undivided one-half interest in a lot in an addition to the city of Omaha, and that $1,700 is the value of such interest. The court also found that Lizzie Freling inherited the interest in the lot from her husband and that her interest in such lot was subject to sale for the payment of debts contracted by her after her husband's death. And the court further found that Matson took charge of the real estate above described, which was the homestead of the Frelings, and that he retained charge thereof until May 18, 1929, which was the date of the trial, but that he had not accounted for the rental value of the undivided one-half interest belonging to the Lizzie Freling estate. Thereupon the court found and decreed that the executor was and is chargeable with $210 for such rental value from March 6, 1928, to the time of the trial.

Section 2832, Comp. St. 1922, provides:

"If the homestead was selected from the separate property of either husband or wife, it vests on the death of the person from whose property it was selected, in the survivor, for life, and afterwards in decedent's heirs forever, subject to the power of the decedent to dispose of the same, except the life estate of the survivor, by will. In either case it is not subject to the payment of any debt or liability contracted by or existing against the husband and wife or either of them previous to or at the time of the death of such husband or wife, except such as exists or has been created under the provisions of this chapter: Provided, further, that in case the surviving spouse wilfully fails to provide a suitable home and maintenance for the minor children of the deceased during their minority or elects to partition the homestead premises, the homestead right of the survivor shall then terminate and the homestead premises shall then descend as other real property of which the decedent died seised."

The executor points out that the real estate, as the home-

stead of Lizzie Freling, is exempt from sale for her debts. We do not think that a lien was established as against her life estate arising out of her homestead right, by her simply contracting debts in her lifetime. Upon her death her life estate in the homestead became extinct, and the rights of her common creditors as well as to such homestead.

In *Judson v. Creighton*, 88 Neb. 37, this is said: "Where a homestead is selected during the lifetime of both husband and wife, and after the death of one the survivor resides upon the premises during his or her life, the real estate is not subject to sale for the satisfaction of the debts of either, which are not a lien thereon, nor to pay the costs of administering the estate of such survivor; but, if the title-holding spouse dies intestate, the title descends to his or her heirs, whether direct or collateral, exempt from such debts."

And in *McFarland v. Flack*, 87 Neb. 452, we held: "Upon the death of the owner of the fee in a homestead estate the same descends to the surviving spouse for life, and the remainder to the children of the owner of the fee title."

We do not think the record shows negligence on the part of the executor in failing to rent the premises. He testified, and it is not denied, that he was unable to find a tenant and that therefore the son of Lizzie Freling, after paying for the household furniture, lived in the home to protect it against fire, molestation, and destruction, under an agreement whereby he was to vacate the premises on three days' notice that a tenant had been procured. Clearly, the executor was not negligent in the premises and is not chargeable with the rental value of the home in question.

It also appears that when Freling died he was the owner of personal property consisting of an interest in a certain leather goods business which had been theretofore carried on under the firm name of Freling & Steinle. And the court found that Mrs. Freling inherited $1,012.28, as her interest in the partnership assets. The court also found that "no prudent attempt on the part of said executor has been made to collect and enforce or obtain possession of

said personal property or any part thereof or the proceeds thereof, or any interest therein, and that the said Roy W. Matson, executor, is chargeable with the value thereof."

The executor filed an application wherein he prayed that the court direct the administrator of the Eugene R. Freling estate to "show cause by an early date, to be fixed by the court, why the personal property belonging to the estate of Eugene R. Freling, to wit, an interest in the firm of Freling & Steinle, should not be sold and converted into cash." Subsequently, a proceeding in bankruptcy was instituted by Steinle, the surviving partner. W. A. Ehlers, attorney for the executor, testified that the assets of the business were sold, but that the returns therefrom were considerably less than the amount of the claims filed against the firm, and that there were no assets remaining from the firm that could be reduced to cash as belonging to the estate herein. And it also appears that, under a court order, $1,260 was directed to be paid to Lizzie Freling as widow's support during her lifetime by the Freling & Steinle firm, but that $540 thereof remained unpaid. It also appears that, after the death of her husband, Mrs. Freling had nothing to do with the affairs of the firm, but that such affairs were managed solely by the surviving partner.

The executor's contention is that Lizzie Freling's estate was a member of the Freling & Steinle partnership, and that it was not a creditor of Richard Steinle, the surviving partner, and that, since the business was bankrupt, the estate of Lizzie Freling could recover nothing. It does not appear to us that the estate of Lizzie Freling became a partner of the firm. The record appears fairly to disclose that the business was managed solely by Steinle as his own for several years after his partner's death, and that he paid the debts of the firm that were owing when Freling died. And Steinle appears thereafter to have conducted the business as his own without interference by, or participation in, or suggestion from, Mrs. Freling. In 1926, two years after Freling died, it appears from an inventory which was

prepared by the executor of the Eugene R. Freling estate that the decedent's interest in the partnership then amounted to $11,826.89. That Matson was closely and intimately associated with the affairs of the firm in question throughout his connection with the Lizzie Freling estate appears to be established. And the record also appears to disclose that Matson was justly chargeable with neglect, as found by the trial court, in failing to force the collection or an accounting of the claim in question from the estate of Eugene R. Freling in behalf of the Lizzie Freling estate.

In 2 Schouler, Wills (5th ed.) sec. 1209, it is said: "All the chattels of the deceased, wherever situated, are assets, if the representative, by reasonable diligence, considering the means of the estate already under his control, might have possessed himself of them."

An executor of the estate of a deceased person, owning both lands and personal property at the time of his death, is chargeable with the duty of acquainting himself with the title to such real estate and personal property and of enforcing an accounting thereof as against all persons who may be in adverse possession thereof or who may claim an adverse title or interest therein as against such estate.

In *Russell v. McCall*, 141 N. Y. 437, the court said: "While, upon the death of one of two copartners, the successor has the legal title to the firm assets, he does not become the full and absolute owner thereof, but holds them charged with a duty to pay the firm debts and to dispose of the residue for the benefit of himself and the estate of the deceased partner, and when, instead of gathering the assets, paying the debts, winding up the business and distributing the surplus, he misappropriates them and converts them to the use of himself and others, he is so far guilty of a breach of trust that a court of equity may give appropriate relief."

From a review of the record and the law applicable thereto, we conclude that the judgment of the district court must be and it hereby is reversed in so far as it relates to the sale of the homestead and the rental value thereof.

That part of the judgment is affirmed, however, wherein the court found the executor chargeable with the value of the Lizzie Freling estate's interest in the estate of Eugene R. Freling.

AFFIRMED IN PART, AND REVERSED IN PART.

JAMES J. BLAHA, APPELLEE, V. CHICAGO & NORTHWESTERN RAILWAY COMPANY, APPELLANT.

FILED APRIL 18, 1930. No. 27132.

1. **Release**: AVOIDANCE: FRAUD: BURDEN OF PROOF. The general rule is that, where one seeks to avoid the consequences of a release for personal injuries, the burden is upon him to establish by a preponderance of the evidence that the said release was secured through false and fraudulent representations. *Perry v. Omaha Electric Light & Power Co.*, 99 Neb. 730.
2. ———: ———. The statement of a physician employed by defendant as to plaintiff's condition, if false, may be sufficient to avoid a release executed in reliance upon such false statement.
3. **Trial**: INSTRUCTIONS. "Whether the instructions could have produced misconception in the minds of the jury is not to be ascertained by merely considering isolated statements, but by taking into view all the instructions given, and the tendencies of the proof in the case to which they could possibly be applied." *Parsons v. Chicago & N. W. R. Co.*, 110 Neb. 836, quoting from *Seaboard Air Line Ry. v. Padgett*, 236 U. S. 668.
4. **New Trial**: NEWLY DISCOVERED EVIDENCE: DISCRETION OF COURT. "A motion for a new trial on the ground of newly discovered evidence is addressed to the sound judicial discretion of the court, and will not be overruled unless a clear abuse of discretion is shown." *Christensen v. Omaha & C. B. Street R. Co.*, 85 Neb. 694.

APPEAL from the district court for Douglas county: CHARLES E. FOSTER, JUDGE. *Affirmed.*

Wymer Dressler, Robert D. Neely and *Hugo J. Lutz*, for appellant.

John A. McKenzie, contra.

HEARD before GOSS, C. J., DEAN, GOOD, THOMPSON and DAY, JJ., and FITZGERALD and HASTINGS, District Judges.

DAY, J.

This is a suit by James J. Blaha, a car repairer, employed by the Chicago & Northwestern Railway Company, for damages for personal injuries, alleged to have been sustained by him on account of being struck on the head with a sledge hammer, in the hands of a codefendant and coworker, who was striking a long chisel bar which was then held by the plaintiff, in the performance of their duties as car repairers. From a verdict in favor of the plaintiff, the railroad company appeals.

About three weeks following the accident, the plaintiff settled with the company for the resultant damages and executed a release therefor. He seeks to avoid the consequences of this release, alleging that it was secured by false and fraudulent statements and representations made by an agent of the company. Since the right of the plaintiff to maintain an action depends upon this question, it will be considered first.

The general rule is that, where one seeks to avoid the consequences of a release for personal injuries, the burden is upon him to establish by a preponderance of the evidence that the said release was secured through false and fraudulent representations. *Perry v. Omaha Electric Light & Power Co.*, 99 Neb. 730. In this case the jury were so instructed and the verdict has resolved that question in favor of the plaintiff, since in this jurisdiction it is a question of fact for the jury. *Simpson v. Omaha & C. B. Street R. Co.*, 107 Neb. 779; *Osborne v. Missouri P. R. Co.*, 71 Neb. 180; *Perry v. Omaha Electric Light & Power Co.*, 99 Neb. 730.

The question for us to determine here is whether the evidence is sufficient to sustain the verdict. The plaintiff was cared for by a physician employed by the defendant. This physician, according to the evidence most favorable to the defendant, minimized and deprecated the plaintiff's injuries. After a very short time (less than a month), he discharged the plaintiff from his care and directed that he return to work. The plaintiff, relying upon this physician's statements as to his physical condition, settled with the

defendant for a nominal sum, $150, and returned to his work. This physician contended then, and still contends, that the plaintiff's injuries were slight and inconsequential. Granting that the physician was acting in good faith (and the evidence does not justify a finding that he was not) there is evidence tending to prove that the plaintiff was seriously injured. For example, the plaintiff, after attempting to work about two weeks, and finding that his physical condition was not such as would permit him to continue, called upon this physician, who, after some argument, sent him to a hospital. At the hospital ice packs were placed upon his head and Dr. Jonas, a physician and surgeon, also employed by the Chicago & Northwestern Railway Company, performed a serious operation upon his skull. This evidence, together with the inadequacy of the settlement, sustain the finding of the jury that the settlement and release in this case were secured by false representations. The statement of a physician employed by defendant as to plaintiff's condition, if false, is sufficient to avoid a release, executed in reliance upon such false statements. 48 A. L. R. 1486; *Haigh v. White Way Laundry Co.*, 164 Ia. 143, 50 L. R. A. n. s. 1091; *Wingfield v. Wabash R. Co.*, 257 Mo. 347; *Granger v. Chicago, M. & St. P. R. Co.*, 194 Wis. 51.

The defendant contends that fraud and false representations necessary to avoid a release must be proved by clear and convincing evidence. In support of this contention, it cites *Krause v. Long*, 109 Neb. 846. In the cited case, a suit in equity, a judgment secured in a court of law was vacated because said judgment was procured by fraud and perjury. The appellant's application of this rule to the avoidance of a release secured by an employer from an injured employee is novel and untenable. The defendant, in its reply brief, admits the soundness of this rule in the following language: "We would not contend that if, in fact, a man is deceived by the false statements of the attending physician as to his condition, and if he signed a release in reliance upon such false statements, he would be bound by the release." The question, then, as we have

stated, is whether the evidence supports the verdict. The fact is undisputed in this record that after the representation was made, and after the release was signed, another physician and surgeon, employed by the company, performed a proper, if not a necessary, operation upon the skull of the plaintiff. That evidence is sufficient to support the verdict as to the avoidance of the release.

The next question, in degree of importance, presented, is whether any actionable negligence was proved. The plaintiff, with a coworker, was working for the company as a car repairer at the time of the accident. He was holding a chisel to cut off a bolt, which was accomplished by his companion striking the chisel with a sledge hammer. In the prosecution of this operation, the plaintiff was hit on the head with the sledge hammer. Both of these men were familiar with this work. When the plaintiff was holding the chisel, he could not see the man with the sledge hammer, and his safety depended upon his coworker's care in striking the chisel. The plaintiff did not know how the accident happened, except that he was hit on the head and rendered unconscious. His companion, the only other witness present at the time, and the only one who could know anything about it, testified that he hit the chisel a glancing blow. This man was wielding the sledge hammer and was in a position where he could see the plaintiff's head as well as the chisel he was striking. He knew plaintiff could not see how he was striking the blow. He testified on cross-examination that, if he had used care, he could have avoided the accident. True, he also testified that he always used care, when questioned later by the company's attorneys. There is some conflict in the testimony, and particularly in the conclusions which each party has drawn from the same. However, we have examined the evidence as to how the accident happened, and, taken in connection with the physical facts surrounding, it is sufficient to sustain the verdict as to the liability of the defendant on the question of negligence.

This brings us to a consideration of the sufficiency of

the evidence to sustain the verdict on the question of plaintiff's injuries. Suffice it to say that we have examined the record relative to the question of the plaintiff's injuries, and find the evidence sufficient to sustain the verdict. To detail the evidence would require too much space, but summarized it is as follows: The plaintiff was injured by a blow with a sledge hammer on March 14, 1927; he was sick in stomach and weak; he was attended by a doctor; he was home for four weeks; he returned to work April 11; he worked nine days until he was compelled to quit, when he called upon the railroad physician, who took him to the hospital, where a company surgeon operated upon his skull; that he was in the hospital for 12 days before the operation, during which time he had ice bags on his head; he was confined to his bed about five weeks after the operation, and he lost weight and could not sleep. This indicates with certainty that there is ample evidence in the record, if believed by the jury, to support the verdict as to the injuries of the plaintiff.

The defendant complains that the court in its instructions did not limit the consideration of the jury to the negligent acts set out in the petition, and refused to give the defendant's instruction on the question. In the first instruction the court delineated the allegations of negligence in plaintiff's petition as follows:

"(a) The defendant Ben Heldt allowed the hammer to glance off the chisel bar and to strike the plaintiff; (b) in allowing and permitting said defendant Ben Heldt to strike the said hammer from a position in which, if the hammer did glance from said chisel bar, it would strike the plaintiff; (c) in failing to provide the plaintiff and the defendant Ben Heldt with proper and adequate tools and appliances with which to perform their duties in a proper manner; (d) in allowing and permitting the defendant Ben Heldt to use said hammer, when he was not properly skilled in such work; (e) in not providing the plaintiff with a track chisel so that the same could be held in a position with safety by the plaintiff."

By a subsequent instruction the court told the jury that, before the plaintiff could recover, the burden of proof was upon the plaintiff to establish by a preponderance of the evidence that the defendant railway company and the defendant Heldt were negligent, in the particulars as set out in the petition. It is claimed that there is no evidence to support some of these allegations of negligence. Certainly there is evidence in the record to support allegations under "a," "b," and "d" of said instructions. In *Parsons v. Chicago & N. W. R. Co.*, 110 Neb. 836, quoting from *Seaboard Air Line Ry. v. Padgett*, 236 U. S. 668, it was held: "Whether the instructions could have produced misconception in the minds of the jury is not to be ascertained by merely considering isolated statements, but by taking into view all the instructions given, and the tendencies of the proof in the case to which they could possibly be applied." This is merely a restatement of the rule announced in a long line of cases too numerous to need citation here. From a careful perusal of the record, including the instructions, while it is improper to give an instruction upon an issue not having proper support in the evidence, even though it may be alleged in the pleadings, nevertheless, reversible error cannot be predicated if it is clearly shown by the record that the jury could not have been misled or prejudiced thereby, and otherwise clearly understood the issues actually tried. No reversible error was committed in this regard in this case.

Finally, the appellant contends that the trial court erred in overruling the motion for a new trial. The ground upon which it is urged that the motion should have been sustained was that of newly discovered evidence. The newly discovered evidence is that, 11 years prior to the accident involved in this case, the plaintiff was injured in an accident while working for another railroad. Defendant contends that plaintiff concealed from it that he had worked for another railroad, or that he had been injured. At the beginning of his testimony he stated he went into railroad work as a car repairer in 1911 and had been working as

such ever since; that he had worked for the Northwestern since August, 1918. Surely this testimony was notice to defendant that the plaintiff had worked for a railroad other than it for a period of seven years, yet they did not inquire about it upon cross-examination. The import of this newly discovered evidence, according to the defendant, is that the plaintiff's present physical condition is due wholly or in at least a large measure to his previous injury. The newly discovered evidence would largely be the testimony of Dr. Young, who testified in the trial as a witness. His testimony was based upon an examination of the plaintiff and the testimony of other witnesses at the trial. The testimony of men with whom plaintiff worked was to the effect that he was irritable, flighty, and hard to get along with. With this in mind, Dr. Young testified that plaintiff was an "emotionally unstable individual;" that "emotional unstability may be a constitutional characteristic of the individual;" that "an injury such as he received * * * might and would undoubtedly increase the degree of emotional unstability;" that he found no organic injury to the brain; that the pendency of a law suit for damages is recognized as one of the reasons for emotional unstability which claimants sometimes exhibit. In the affidavit of this witness, filed to support the motion for new trial, he states that he has now found, although he did not remember it at the time of the trial, that he examined the plaintiff in 1916, at the time he was injured while in the employ of another railroad; that his records show that his complaints then are identical with his present complaints; that in 1926 he caused the wife of plaintiff to be interviewed, and that his records show that she stated his condition had not improved from the time of the accident; and that, in his opinion, his present complaints and symptoms are the result of the former accident. All this evidence is as to his physical condition, and is largely a restatement of much of the evidence on the trial. The plaintiff had worked for the Northwestern for more than 10 years as car repairer. He had worked steadily, faith-

fully, and apparently satisfactorily. Let it also be remembered that this witness testified at the trial for the defendant; that at the request of the railroad company he had made a previous examination; that all the information he has now was then in his records, available to him and the defendant. A new trial will not be granted where witness testified on the trial (*Fitzgerald v. Brandt*, 36 Neb. 683; *Van Dorn v. Mengedoht*, 41 Neb. 525); nor where a witness omitted to testify on the trial as to the facts urged as newly discovered evidence (*State v. Ginger*, 80 Ia. 574; *Sioux City Stock Yards Co. v. Sioux City Packing Co.*, 110 Ia. 396). In fact, this case had been of sufficient interest to him that he caused an investigation to be made two years before, when his investigator told him that plaintiff's wife told him the plaintiff's condition had not improved. Of course, his testimony as to this fact was hearsay, and therefore incompetent evidence. A new trial will not be granted on the ground of newly discovered evidence, unless such evidence would be competent upon a retrial of the case. *McNeal v. Hunter*, 72 Neb. 579.

In addition to the affidavit of Dr. Young, who testified at the trial, the affidavit of Dr. Tyler was also filed. He was a doctor who cared for him at the time of the prior injury and describes it in detail. He did not state, and he apparently could not state, that his present disability is due to the injury suffered more than 10 years before. The trial judge had in mind all the evidence in the case, including the undisputed fact that this plaintiff had sufficiently recovered from the previous injury to perform more than 10 years of service for the defendant. "A motion for a new trial on the ground of newly discovered evidence is addressed to the sound judicial discretion of the court, and will not be overruled unless a clear abuse of discretion is shown." *Christensen v. Omaha & C. B. Street R. Co.*, 85 Neb. 694; *Peterson v. Kouty*, 103 Neb. 321; *Phegley v. State*, 113 Neb. 138.

There is no evidence in this case tending to prove that the prevailing party testified falsely on a vital issue, nor

upon any issue, which would require the granting of the new trial. *City Savings Bank v. Carlon,* 87 Neb. 266. The conclusion is forced upon us, after a careful consideration of the record, that the action of the trial court in overruling the motion of the defendant was not an abuse of judicial discretion.

We have carefully read the record in this case, as suggested by appellant; we have examined all the instructions requested as well as those given by the court, and we find no reversible error in the instructions as given. We have discussed only those assignments of error argued orally before the court, or discussed in the briefs. In conformance with the foregoing opinion, the judgment of the trial court is

AFFIRMED.

HARLEY H. FETTY V. STATE OF NEBRASKA.

FILED APRIL 18, 1930. No. 27249.

1. Witnesses: OATH: WAIVER. Where, during the trial of a case, the testimony of a witness is taken without an oath being administered, a party litigant not making an objection at the time waives said objection.
2. Jury: DRUNKENNESS OF JUROR. Where, as in this case, there is evidence in the record, uncontradicted, that a juror, during a recess of the court, was found wandering about the streets of the city wherein the court was sitting, in a drunken and irresponsible condition, and where he was arrested in such condition by the sheriff of the county upon a warrant issued upon a complaint charging drunkenness, and was in jail at the hour for resumption of the trial, it is the duty of the trial court to determine whether the juror's condition is such as to require the discharge of the jury.
3. ———: ———. In the determination of this question, the trial court may also consider the appearance and condition of the said juror at the time of hearing on his qualifications, as well as the evidence adduced therewith.
4. ———: ———. DISCHARGE OF JURY. If, after hearing the evidence and an examination of said juror, it is the judgment of the trial court that said juror is unable or in an unfit condition to proceed with the trial on account of his drunkenness, such

drunkenness is an accident or calamity as contemplated by section 10151, Comp. St. 1922, requiring the discharge of the jury.

5. ———: PEREMPTORY CHALLENGES. "The rule is that peremptory challenges are not to be exercised until the jurors have been passed for cause and twelve persons are in the jury-box having the qualifications of jurors." *Mathes v. State*, 107 Neb. 212.

6. ———: EXAMINATION FOR CAUSE. The right to examine a juror for cause is a substantial right to which the defendant is entitled and he cannot be deprived of said right, which continues until the jury is finally impaneled for the trial. A denial of said right of examination for cause is prejudicial error.

ERROR to the district court for Webster county: LEWIS H. BLACKLEDGE, JUDGE. *Reversed.*

J. E. Willits, for plaintiff in error.

C. A. Sorensen, Attorney General, and *Clifford L. Rein, contra.*

HEARD before GOSS, C. J., ROSE, DEAN, THOMPSON, EBERLY and DAY, JJ., and LIGHTNER, District Judge.

DAY, J.

Plaintiff in error, hereinafter designated defendant, was convicted of an intent to extort money by means of written communications threatening the life of Ralph E. Hunter. This is the second appearance of this case in this court. Former opinion reported in 118 Neb. 169.

It appears that, after the trial had proceeded for an entire day, the jury had been impaneled and sworn and the opening statements of counsel had been completed and seven witnesses had testified on behalf of the state, the court adjourned until the following day. It further appears that, during this interval and while the jury were separated, one of the jurors was arrested for drunkenness during the evening and was in jail pending trial on said charge the next morning at the time designated for the resumption of the trial. Before proceeding with the trial, the court held an investigation of the situation of this juror, to which investigation of the juror defendant made no objection at the time. The defendant now objects to the pro-

ceedings for that the witnesses were not sworn. The record reveals that the sheriff testified as to the whole circumstances relative to the juror's disqualification, and that he had previously been sworn as a witness in the case. The testimony of the other witnesses with respect to the matter upon inquiry was merely cumulative. The defendant, having made no objection at the time as to the method of taking the testimony, cannot now complain. *City of O'Neill v. Clark,* 57 Neb. 760. The defendant complains now, although again he did not complain at the time of the trial, that the evidence relative to the disqualification of the juror who was discharged was not sufficient to sustain the action of the trial judge in removing him from the jury. Section 10151, Comp. St. 1922, provides, in so far as applicable to this case: "In case a jury shall be discharged on account of sickness of a juror, or other accident or calamity requiring their discharge, * * * the court shall, upon directing the discharge, order that the reasons for such discharge shall be entered upon the journal; and such discharge shall be without prejudice." Where, as in this case, there is evidence in the record, uncontradicted, that a juror, during a recess of the court, was found wandering about the streets of the city wherein the court was sitting, in a drunken and irresponsible condition, and where he was arrested in such condition by the sheriff of the county upon a warrant issued upon a complaint charging drunkenness, and was in jail at the hour for the resumption of the trial, it is the duty of the trial court to determine whether the juror's condition is such as to require the discharge of the jury. In the determination of this question, the trial court may also consider the appearance and condition of the said juror at the time of the hearing on his qualifications, as well as the evidence adduced therewith. If the juror is unable or unfit to proceed with the trial in the judgment of the trial court, after hearing the evidence and an examination of said juror, on account of his drunkenness, such drunkenness is an accident or calamity as contemplated by section 10151, Comp. St. 1922, requiring the discharge of

the jury. The court discharged the juror, which also required the discharge of the entire jury. As a jury and a legal entity, it ceased to exist. *Davis v. State,* 51 Neb. 301; *Quinton v. State,* 112 Neb. 684; *Salistean v. State,* 115 Neb. 838.

The defendant contends that since the trial court did not find the juror sick, or that an accident or calamity had occurred, or that there had been a failure of the jury to agree, the act of the court was, in law, an acquittal, and that he was placed in jeopardy. In *Quinton v. State, supra,* this court, in an opinion by Mr. Justice Thompson, discussed this question in the following language, which is applicable to this case: "From such a contention, reason and justice revolt. While the words 'accident' and 'calamity' are usually used in a physical sense, we hold that they include as well a case where a biased juror is discovered during the progress of the trial, as in this case. The object of the statute is to insure a fair trial to all litigants. We held in *Davis v. State,* 51 Neb. 301, that the insanity of a juror authorizes the discharge of the jury, being an 'accident or calamity.' And in *Sutter v. State,* 105 Neb. 144, we held that the discharge of the jury because of failure to agree is not an acquittal.

"The right, in the absence of statute, to exclude a juror and discharge the jury in a proper case, without prejudice to a future trial of the case on its merits, is and of necessity must be inherent in the court, within its sound discretion. This is necessary to the protection of the state, as well as for the protection of the defendant. To deny it to either would be a flagrant abuse of the discretion imposed. *Simmons v. United States,* 142 U. S. 148; *State v. Vaughan,* 23 Nev. 103; *State v. Wiseman,* 68 N. Car. 203; *State v. Washington,* 89 N. Car. 535; *State v. Diskin,* 34 La. Ann. 919; *King v. Ketteridge,* 1 L. R. K. B. Div. (Eng. 1915) 467.

"Thus, we conclude that the court, in considering the juror disqualified, in discharging the jury, and in sustaining the demurrer to the plea in bar, was clearly within the

law, and that its acts and doings, as shown by the record, did not place defendant twice in jeopardy. *State v. Hansford,* 76 Kan. 678; *State v. Allen,* 46 Conn. 531; *People v. Sharp,* 163 Mich. 79; *Gardes v. United States,* 87 Fed. 172."

The other assignment of error urged by the defendant is the method by which the trial court proceeded to select a jury, after the discharge of the disqualified juror. The court proceeded to have men called for examination for the purpose of selecting a juror to take his place. In order to supply the missing man, the court required the clerk to draw from the remaining jurors of the panel, and they were examined for cause. When the regular panel was exhausted, talesmen were called by the sheriff. On the former proceedings the state used one peremptory challenge and waived one, the defendant used two and waived one. The state, therefore, had four remaining and the defendant had three. The court permitted the peremptory challenge to go to any man then in the box, including the eleven who had formerly been examined. In addition, the defendant was allowed another peremptory challenge to take the place of the one waived the day before, upon his complaint that he had not waived as to the men then in the box. The serious objection to this procedure is that the defendant was required to exercise two of his peremptory challenges before the jury-box was filled. "The rule is that peremptory challenges are not to be exercised until the jurors have been passed for cause and twelve persons are in the jury-box having the qualifications of jurors." *Mathes v. State,* 107 Neb. 212. The exercise of peremptory challenges relative to the present case is governed by section 10133, Comp. St. 1922. In *Mathes v. State, supra,* Mr. Justice Dean said: "The rule that is applicable here, and to which we adhere, was announced in *Rutherford v. State,* 32 Neb. 714. In that case, in an opinion by Maxwell, J., it was held that peremptory challenges are not to be exercised until the jurors have been passed for cause and twelve men are in the box. To hold otherwise is there said to be an undue exercise of power prejudicial to the accused." In fact, by

the unique procedure, the defendant was deprived of two peremptory challenges allotted to him by statute, when he was charged with two challenges, exercised when a former jury was impaneled. He was thus denied two peremptory challenges in the impaneling of the jury before whom the case was tried. This was prejudicial to the defendant. In this case, eleven men were placed in the jury-box by the trial court and the defendant was denied the right to examine them for cause. When the court found the one juror disqualified, such a finding required the discharge of the jury, and the jury, as such, no longer existed and was not constituted by the eleven remaining men. These men resumed their status as members of the jury panel. They no longer retained their status as members of the jury impaneled in this case, but were subject to call on any case pending before the court, including the case at bar. The right to examine a juror for cause is a substantial right to which the defendant is entitled and he cannot be deprived of said right, which continues until the jury is finally impaneled for the trial. A denial of said right of examination for cause is prejudicial error. In this case it was prejudicial error for the trial court to deny the defendant the right to examine and challenge for cause all the jurors called.

It is urged by the state that the judgment of the trial court in this case ought to be affirmed under the provisions of section 10186, Comp. St. 1922, and *Baker v. State,* 109 Neb. 558, is cited, wherein it is said, "It is the duty of this court, in every case where error is shown, to determine the question of prejudice before reversing the judgment." We are of the opinion that the rule is not applicable to this case. The state would have us apply it to this case by having this court determine from the record that the defendant was guilty, and that therefore defendant has not been prejudiced because no other verdict could have been returned. The guilt or innocence of the defendant is not to be determined *de novo* in this court, but is one for a jury, drawn, summoned, and impaneled as provided by law. Since we have already determined that the errors occurring at the

trial, as before related, were prejudicial, the rule in the foregoing statute is therefore not applicable to this case. The statutes and the decisions of this court definitely set out the course to be pursued by the trial court, when confronted by such an emergency as arose in this case, and we cannot approve a radical departure therefrom.

Other questions are discussed in the briefs; but, since the case must be retried, and the alleged errors are unlikely to occur on said trial, we do not deem it necessary or useful to discuss them here.

REVERSED AND REMANDED.

W. G. SUMMERS, APPELLEE, V. AUTOMOBILE INSURANCE COMPANY OF HARTFORD, APPELLANT.

FILED APRIL 18, 1930. No. 27225.

1. **Appeal:** ISSUES. It is the settled law of this state that a cause is to be tried in the appellate court upon the same issues that were presented in the court from which the appeal was taken, with the exception of new matter after the first trial.
2. ———: ———. Where, in an appeal from the judgment of the county court, the petition filed in the district court is assailed on the ground that it tenders other and different issues than those tendered in the court below, the question of fact, raised by such motion, is ordinarily determinable by a comparison of the petition filed in the district court with that upon which the cause was submitted to the county court.
3. ———: ———. The rule requiring cases on appeal to be tried on the same issues as those upon which they were tried in the court below does not require that the petition filed in the appellate court be in the precise language of that filed in the lower court; but, unless the ultimate facts relied upon for a recovery are substantially the same, and provable by evidence of the same character, it constitutes a change of the issues.
4. ———: CHANGE OF ISSUES. The pleading of a waiver in the district court for the first time, after an appeal from a judgment in a term case in the county court, constitutes a change of the issues, and a motion to strike the same should be sustained.

APPEAL from the district court for Garfield county: EDWIN P. CLEMENTS, JUDGE. *Reversed.*

Montgomery, Hall, Young & Johnsen and *Davis & Vogeltanz,* for appellant.

B. A. Rose and *E. M. White, contra.*

HEARD before GOSS, C. J., DEAN, GOOD, EBERLY and DAY, JJ., and CARTER and CHASE, District Judges.

CARTER, District Judge.

This is an action brought in the county court of Garfield county, Nebraska, to recover damages for loss of crops under the terms of a hail insurance policy. The answer admitted the contract of insurance, but alleged that it contained a provision that the company was not liable unless sworn proof of loss should be furnished the company within 60 days after the loss, setting forth specific information relative to the loss, and that said proof had not been furnished as required by the policy. No reply was filed. A trial was had, judgment awarded plaintiff, and an appeal taken to the district court.

In the district court plaintiff filed a petition almost identical with the petition filed in the county court. Defendant filed its answer raising the same issue as was raised in the county court. The reply was a general denial. Trial was had and a verdict and judgment awarded plaintiff. An appeal was taken to this court, where the judgment was reversed. *Summers v. Automobile Ins. Co.,* 117 Neb. 318.

After the mandate of this court had been filed in the district court, plaintiff asked leave to file an amended petition alleging a waiver of the terms of the policy that had been previously pleaded as a defense. Written objections were filed to the allowance of the motion for leave to amend, on the ground that such an amendment, if allowed, would change the issues as presented on the trial of the case in the county court. The district court overruled the objections and permitted the amendment. Defendant then moved to strike the allegations alleged to constitute a waiver for the reasons previously set out in its objections to the amendment, which motion was also overruled. Defendant refused to plead further, a trial was had, and a judgment

entered. From this judgment the defendant appeals.

The defendant (appellant here) contends that the district court erred in overruling defendant's objections to the waiver allegations in the amended petition, and in overruling defendant's motion to strike from the amended petition that portion alleging waiver by the defendant of the terms and conditions of the policy. The only question for us to decide is whether the amendment permitted by the district court constitutes a change in the issues as pleaded and presented in the county court. The plaintiff in the county court alleged that he had complied with the terms and conditions of the contract of insurance. The defendant alleged as a defense a failure to furnish proofs of loss as required by the policy. No reply was filed. Under these pleadings, the question of a waiver of the conditions of the policy was not an issue. The question of waiver raises an issue that must be pleaded, and cannot be shown under a general denial. *Mordhorst v. Nebraska Telephone Co.*, 28 Neb. 610; *Swett v. Antelope County Farmers Mutual Ins. Co.*, 91 Neb. 561; *Summers v. Automobile Ins. Co.*, 117 Neb. 318. A waiver has been defined in an early holding of this court as "an intentional relinquishment of a known right, and there must be both knowledge of the existence of the right and an intention to relinquish it." *Livesey v. Omaha Hotel Co.*, 5 Neb. 50. In accordance with the general rule as to the burden of proof, it devolves upon the party claiming a waiver to prove the facts on which he relies to establish it. It is, therefore, more than a mere issuable fact, it is a complete defense to a breach or forfeiture when established by competent evidence. Its very nature discloses that proof of a different character is required to support it. After a pleading of a waiver, the identity of the cause of action is not the same as it was before. In a recent case this court said: "The motion to strike was sustained to that part of defendant's answer which alleged, in substance, that defendant advised plaintiff of his intention to claim two-thirds of the fee and that plaintiff made no objection thereto, but permitted the defendant to brief and

argue the case on appeal and brief and argue two motions for rehearing, and that by such conduct and silence on his part, when advised of the intention of defendant, plaintiff was thereby estopped from claiming a 50 per cent. division of the fee. An examination of the answer in the county court shows that nothing of this kind was alleged. If the new allegations of the answer in the district court were sufficient to plead an estoppel, then it presented a change of the issues from what these were in the county court, and the ruling of the trial court striking out such allegations was right." *Langdon v. Kennedy, Holland, DeLacy & McLaughlin*, 118 Neb. 290. We believe the rule set out in the foregoing case to be the rule to be applied in the case at bar.

When the district court permitted the amendment setting up the waiver of the conditions of the policy that had been pleaded as a defense, the evidence necessary to sustain the allegations of the amended petition must necessarily be of a much different character than that required to sustain the allegations of the petition filed in the county court, and, such being the case, the issues are not the same and the identity of the cause of action was changed. After the amendment, the facts alleged to constitute a waiver became ultimate facts relied upon for a recovery by the plaintiff in the district court which were not presented to the county court. This court has repeatedly held that actions must be tried in the appellate court upon the same issues upon which they were tried below. This rule does not require that the petition in the appellate court shall be in the precise language of that upon which the cause was submitted below. The most that it requires is that the ultimate facts relied upon for a recovery shall be the same in both courts, and provable by evidence of the same character. *Jacob North & Co. v. Angelo*, 75 Neb. 381; *Coleman v. Spearman, Snodgrass & Co.*, 68 Neb. 28. It is the settled law of this state that a cause is to be tried in the appellate court upon the same issues that were presented in the court from which the appeal was taken, with the

exception of new matter arising after the first trial. *Merchants Nat. Bank v. American Eagle Tire Co.*, 107 Neb. 48; *Inglehart v. Lull*, 64 Neb. 758, 69 Neb. 173; *Cobbey v. Buchanan*, 48 Neb. 391; *Darner v. Daggett*, 35 Neb. 695.

The reason is, an appeal, when a bond is given as in this case, has the effect to vacate the judgment of the court below, and presents the same issue to the appellate court for its determination as was presented in the court below. If new issues can be raised in the appellate court it is not a trial of the same cause, not in fact an appeal. An appeal brings up the case presented in the court below for a new trial, and the issues cannot be changed in the appellate court, except by consent, or in the manner above suggested. *O'Leary v. Iskey*, 12 Neb. 136. This being an appeal from a judgment of the county court in a term case, and the petition having been assailed on the ground that it tenders other and different issues than those tendered in the court below, the question of fact, raised by such motion, is ordinarily determinable by a comparison of the petition filed in the district court with that upon which the cause was submitted to the county court. *Coleman v. Spearman, Snodgrass & Co.*, 68 Neb. 28. A careful examination of the petitions filed in the county and district courts discloses a change in the issues. For the reasons herein set out, the learned trial court erred in overruling defendant's motion to strike the allegations of the amended petition alleging a waiver of the conditions in the policy.

The plaintiff having admitted in his amended petition that the allegations of defendant's answer are true, and, it having been determined herein that the amendment setting up a waiver of the conditions of the policy pleaded as a defense should have been stricken, the judgment is reversed and the cause remanded.

REVERSED.

NELLIE MAY SCHLEE VANCE, EXECUTRIX, APPELLANT, V. J. E. SUMNER, APPELLEE.

FILED APRIL 18, 1930. No. 26881.

1. Injunction: REMEDY AT LAW. The extraordinary remedy by injunction is not available to enforce a legal right, where there is a plain, adequate and speedy remedy at law.
2. ———: ———: LEASE: POSSESSION. Where a lessee has breached the conditions of a lease, which breach, by the terms of the lease, grants to the lessor the right to retake possession of the demised premises, a judgment and a writ of restitution in a forcible entry and detainer suit affords a plain, adequate and speedy remedy at law, and the plaintiff is not entitled to an injunction restraining the lessee from interfering with the lessor's entry upon the premises.
3. Pleading: INSOLVENCY: PRESUMPTION. Where insolvency of a defendant is averred in the pleadings, which is denied by the answer, the issue of insolvency must be proved like any other controverted fact, and the court will not presume insolvency of the defendant.

APPEAL from the district court for Kimball county: J. LEONARD TEWELL, JUDGE. *Affirmed.*

F. C. Radke, Magdelene Craft Radke and *Orville C. Wisdom,* for appellant.

Roland V. Rodman and *John H. Kuns, contra.*

HEARD before GOSS, C. J., DEAN, GOOD and EBERLY, JJ., and RHOADES, SPEAR and TEWELL, District Judges.

RHOADES, District Judge.

This is a suit in equity seeking injunctive relief against the defendant, who was the tenant of the plaintiff, to enjoin the tenant's interference with plaintiff and her agents entering upon the leased premises for the purpose of planting wheat prior to the termination of the defendant's lease. The parties entered into a written lease in 1922, which terminated March 1, 1925, the tenant holding over under a leasing from year to year until March 1, 1929, where, by reason of a written and timely notice, the lease was terminated. Said lease provided: "It is further agreed that the party of the first part (plaintiff) and her agents may

go upon said premises at any time * * * to plow for future crops and to sow small grain in corn and stubble ground in the fall before the expiration of the lease." Plaintiff, in August 1928, leased the premises to one E. J. Kiddle, for the year 1929, authorizing him to enter onto and plant fall wheat in the available ground, pursuant to the above referred to clause in the lease. It appears that some time in September, 1928, the exact date becoming immaterial, plaintiff, by her new tenant, attempted to go upon the premises for the purpose of planting fall wheat thereon, and defendant refused and prevented entry upon the land.

This suit in equity was instituted seeking injunctive relief, and on September 14, 1928, the county court of Kimball county issued a temporary restraining order against the defendant enjoining interference with plaintiff and her agents, and on September 17, 1928, the district court granted a temporary injunction. On final hearing the court entered its decree finding that the plaintiff is entitled to possession by reason of the fact that the defendant violated the conditions of the lease by refusing to allow plaintiff to sow stubble ground to crop in the fall of 1928, and that plaintiff has a right to declare said lease forfeited, and that due notice had been given to terminate the lease as of March 1, 1929. The trial court found that there was no proof of insolvency of the defendant, and that plaintiff had an adequate remedy at law and cannot maintain a suit in equity for an injunction. Whereupon plaintiff's action was dismissed.

It is elementary that a suit in equity will not lie when the plaintiff has a plain, adequate and speedy remedy at law. *Hahn System v. Stroud*, 109 Neb. 181; *Western Union Telegraph Co. v. Douglas County*, 76 Neb. 666; *Brown v. Reed*, 72 Neb. 167.

In *Mohat v. Hutt*, 75 Neb. 732, where plaintiff sought by injunction to restrain defendant from interfering with his possession of land, this court held that the equitable relief by injunction cannot be substituted for ejectment or for-

cible entry and detainer. It is said in the opinion: "It is clear to us that this suit is simply an attempt to employ the extraordinary writ of injunction to enforce what, at most, is a mere legal right, and one which the ordinary remedies at law are amply adequate to protect. In other words, it is an attempt to substitute the remedy by injunction for ejectment, and forcible entry and detainer, and the prayer for an injunction for that purpose should have been denied. *Warlier v. Williams*, 53 Neb. 143; *Wehmer v. Fokenga*, 57 Neb. 510. See, also, *State v. Graves*, 66 Neb. 17."

In *Warlier v. Williams*, 53 Neb. 143, plaintiff sought to regain possession of real estate by the extraordinary remedy of injunction. This court there held that plaintiff might have instituted against the defendants an action of forcible entry and detainer under the statute. The question was there presented whether or not the statutory remedy was an adequate one, and it was said: "This remedy is not only an adequate one but it is a summary and a speedy one. * * * . A judgment and a writ of restitution in a forcible entry and detainer suit would afford him the same and a more speedy redress than a proceeding by injunction." This case likewise disposes of the argument presented in reference to the insolvency of the defendants, which was pleaded, but not proved. It is said in the opinion: "If the defendants in error are insolvent, then the plaintiff in error has no redress for the costs and expenses that he may incur in prosecuting either an injunction suit or a forcible entry and detainer suit."

The case of *State Bank of Nebraska v. Rohren*, 55 Neb. 223, relied upon by the appellant, is distinguishable from the case at bar, as it was said in that case that the landlord cannot cancel the lease and retake possession of the leased premises by forcible entry and detainer because of the lessee's refusal to permit appellee to enter upon the land and fall plow it, "as the lease makes no provision for its forfeiture on that ground." In the case at bar the lease provides: "It is further expressly agreed that * * * if the second party * * * violate any of the conditions of this

contract, then this lease shall thereby terminate." Defendant's refusal to allow the plaintiff and her agents to enter upon the land violated the provisions of the lease, and thereby terminated the lease; whereupon the plaintiff had a right to institute an action in forcible entry and detainer which provides a plain, adequate and speedy remedy at law.

In *Carlson v. Koerner*, 226 Ill. 15, a case similar to the facts presented in case at bar, the lease provided that, if appellant failed to keep the covenants therein contained, the appellee should have the right to declare the lease null and void and retake possession. The court in the opinion said: "If appellant refused to allow appellee to enter for the purpose of doing what the lease expressly provides she might do, appellant violates the terms of the lease, and appellee had her election to bring an action of forcible entry and detainer and thereby secure possession of the premises."

Other assignments of error which have been presented need not be considered, as, the plaintiff having an adequate remedy at law for the relief sought to be had by the extraordinary remedy of injunction, equitable relief must be denied and the judgment of the trial court affirmed.

Pursuant to stipulation of the parties hereto, each party shall pay his own costs.

AFFIRMED.

NELLIE WEST ET AL. V. STATE OF NEBRASKA.

FILED APRIL 25, 1930. No. 27300.

1. **Larceny**: ESSENTIAL ELEMENTS: FELONIOUS INTENT. The felonious intent to deprive a person of his property is an essential element of grand larceny.
2. **Criminal Law**: FELONIOUS INTENT: PROOF. To sustain a conviction for grand larceny, the felonious intent to defraud the owner of property taken by accused must be proved beyond a reasonable doubt.
3. ———: ———: CIRCUMSTANTIAL EVIDENCE. Where the felonious intent essential to a conviction for grand larceny is inferable alone from circumstances, they must be such as to ex-

clude every reasonable hypothesis on that issue except the guilt of accused.

4. Larceny: SUFFICIENCY OF EVIDENCE. In a prosecution for the larceny of an automobile, where accused claimed to be the owner of it by oral gift and proved that it was taken under advice of counsel, the evidence outlined in the opinion *held* insufficient to sustain a conviction.

ERROR to the district court for Gosper county: CHARLES E. ELDRED, JUDGE. *Reversed and dismissed.*

N. M. York and *Ted R. Frogge*, for plaintiffs in error.

C. A. Sorensen, Attorney General, and *Homer L. Kyle, contra.*

HEARD before GOSS, C. J., ROSE, DEAN, GOOD, THOMPSON and EBERLY, JJ., and LIGHTNER, District Judge.

ROSE, J.

In a prosecution by the state in the district court for Gosper county Nellie West and William E. Lacey, defendants, were convicted of the larceny of an automobile valued at $400. For that felony Nellie West was sentenced to serve a term of one year in the state reformatory for women at York and William E. Lacey was sentenced to serve a term of one year in the state penitentiary at Lancaster. As plaintiffs in error the defendants named have presented for review the record of their conviction.

The controlling question for determination is the sufficiency of the evidence to sustain the conviction. There was a plea of not guilty, which included the defense that Nellie West claimed in good faith to be the owner of the automobile by betrothal gift and took it under advice of counsel. It is contended on behalf of defendants that evidence of the criminal intent essential to a conviction for grand larceny is entirely wanting and that consequently the sentences should be reversed and the prosecution dismissed.

It is settled law that the felonious intent to deprive a person of his property is an essential element of grand larceny. *Waidley v. State*, 34 Neb. 250; *Dobson v. State*, 61 Neb. 584; *Jones v. State*, 101 Neb. 847; *McIntosh v. State*,

105 Neb. 328. To sustain a conviction, therefore, the felonious intent must be proved beyond a reasonable doubt. *Hayward v. State,* 97 Neb. 9. Where felonious intent is inferable alone from circumstances, they must be such as to exclude every reasonable hypothesis on that issue except the guilt of accused. *Smith v. State,* 61 Neb. 296; *Lamb v. State,* 69 Neb. 212; *Lillie v. State,* 72 Neb. 228; *Lowe v. State,* 110 Neb. 325. In this particular is the evidence in the present instance sufficient to sustain the conviction?

There was no dispute about the taking of the automobile by Nellie West. She took it, claiming to be the owner. The information contained the charge that the automobile, a Chevrolet sedan definitely described, was the personal property of J. C. Utterback, special administrator of the estate of John C. Sanders, deceased, and that defendants, on or about March 4, 1929, in Gosper county, Nebraska, "did then and there unlawfully and feloniously take, steal, carry and drive" it away "with intent thereby to defraud the owner." Sanders was a bachelor and resided on a farm a few miles from Holbrook, Gosper county. He asked where he could get a housekeeper, and in reply William E. Lacey, to whom the inquiry had been directed, recommended Nellie West, a divorced woman who had two small children. She was employed by Sanders and entered upon her duties in his home June 17, 1928, where she resided with her children until Saturday, March 2, 1929. On that date Sanders committed suicide in a room in his house. The county attorney, who was also coroner, held an inquest the same day, appointed custodians of decedent's property, immediately placed them in charge of it and procured the appointment of Utterback as special administrator. Appraisers were on the premises Sunday, March 3, 1929, appraised the property March 4, 1929, and listed the Chevrolet sedan as part of decedent's estate. Nellie West took the automobile out of the garage Monday, March 4, 1929, and drove it away. March 5, 1929, was the date of the funeral. Defendants were present at the services.

In connection with the facts outlined, the evidence adduced by the state on the issue of the felonious intent essential to a conviction may be summarized as follows: Sanders bought the automobile June 29, 1928, and paid for it; had the bill of sale and an insurance policy drawn in his own name; procured for himself the necessary license and paid the fee therefor; provided a garage near his house where the car was kept when not in use; carried a set of the Chevrolet keys in his pocket, where they were found on his person after his death; drove the car himself on two or three different occasions between the date of purchase, June 29, 1928, and the date of his death, March 2, 1929; never transferred the title by bill of sale or by other instrument in writing; once referred to the car as his own and at another time indicated a purpose to sell it. The record also contains evidence tending to prove the following facts, in substance: Nellie West was present when the inquest was held, when the custodians and the appraisers were appointed, and when property of decedent was listed, but made no claim to ownership of the automobile. She said she hated to see the car sold and would buy it, if she had the money. Promptly after the appointment of Utterback as special administrator he told Nellie West her services were no longer needed. She expressed a purpose to go to Oxford, in Harlan county, and he told her not to take the car.

Whether the circumstantial evidence is sufficient to exclude every reasonable hypothesis except the felonious intent of Nellie West to steal the automobile depends upon all the circumstances in connection with established facts. She testified positively that she was engaged to be married to John C. Sanders and that he gave her the car as an engagement gift. With her two small children his home had been her home for nine months. Finding herself suddenly in an appalling situation there March 2, 1929, she reported the tragedy by telephone to Oxford, where Lacey, her friend, resided with his wife and four children. He met Nellie West at the Sanders home the next day, advised her

to consult an attorney about her claim to the car, and recommended a capable lawyer in good standing at Red Cloud. She pursued that course. Her testimony, corroborated in many particulars by other witnesses, tends to prove the following facts: She and her children spent Sunday night, March 3, 1929, at the home of the Laceys in Oxford. In Lacey's car she went to Red Cloud the next morning, March 4, 1929; called at the office of the attorney recommended; told him the car was given to her by Sanders as an engagement gift, but did not know there would be trouble with the estate over it; said it was unlocked in the Sanders garage where she had placed it and that she had a set of keys for it; asked if she could take it; was told that it would be all right to do so, to store it and to notify the administrator; returned to Oxford and went from there to the Sanders place the same afternoon, Monday, March 4, 1929, backed the car out of the garage and loaded it with her personal belongings; drove it in the evening to Orleans with her children and one of Lacey's daughters; stored it for the night in a garage there; went back to Oxford with Lacey's son, Paul, and spent the night with the Lacey family; took the car to Red Cloud the next morning, March 5, 1929, and stored it in a garage there; again conferred with her attorney, and, acting on his advice, wrote and mailed to the administrator a letter stating that the car had been given to her by Sanders and asking him to write to her attorney, naming him, if he wanted to know more about it. The letter is in the record and is dated and postmarked at Red Cloud, March 6, 1929.

The attorney consulted by defendants testified as a witness and said that they had called at his office in Red Cloud in the morning on two different occasions and consulted him about the car. Asked to give the substance of the conversation with them, he testified, referring to Nellie West:

"As I recall, the title of this car was in dispute; that is, she claimed it. And as I remember she told me that this man's brother, or the administrator, I have forgotten which, was claiming it. And she told me how long she had

lived here—a few months in this county—and had nothing, as I remember, and could not put up a bond—a bond of replevin. And I said then, 'If I were you, I would take the car to Orleans, over in Harlan county, and make the other side replevin it. They will have to put up a bond, and if you are a stranger up in that county you would have more of a chance in Harlan county than you would up there.' And I think that is about all I can remember. I said, 'I would not want to go away up to Elwood to defend your title to that car. If you want to bring it to Orleans, and, after it is brought there, then tell the administrator or brother where it is, and, if he claims it or wants it, he can replevin it, and the matter can be settled in court.'"

The garage-keeper at Red Cloud, a witness for the state, testified in substance on direct and cross-examination: Defendants delivered a Chevrolet sedan to him for storage March 5, 1929. They said it might be there a week or longer; were having a little trouble with it; had been advised by the attorney to leave it there until they got the trouble settled; were notifying the estate. The car remained there under that arrangement until the sheriff took it away.

The Chevrolet dealer at Holbrook, another witness for the state, testified that Nellie West called alone at his place of business and negotiated for the car; that the deal was consummated with Sanders at his farm when she was present and that she did most of the talking; that when delivered two sets of keys were in the car; that Sanders and Nellie West drove it away, the latter at the wheel.

A Buick salesman testified that Nellie West negotiated with him at Arapahoe for an exchange of the Chevrolet sedan and a payment in money for a Buick car about a week before the death of Sanders; that the negotiations were continued the next day with her and Sanders at the latter's house; that the deal was not closed, but that Sanders, in presence of witness, while the exchange of cars was under consideration, said to Nellie West:

"I have bought you one car, and I have bought you a

radio, and I paid for having your teeth fixed. Now, if I do this, you will do what I want."

The principal argument by counsel for the state on the sufficiency of the evidence to prove felonious intent was directed to the proposition that she did not claim it when the custodians, the administrator and the appraisers were present in the performance of their duties. The inference of hostility toward her is unavoidable. The home of herself and children had been lost. After the death of Sanders the officers were promptly and continuously in charge of the premises and the property of decedent. The car she had been driving for months was in his garage. She was ordered not to take it. She was peremptorily told that her services were no longer needed. The administrator went through her trunk in search of papers belonging to the estate, but found none. The dead body of the man who had provided a home for herself and her children was still in the house that had sheltered them. There is nothing in the record to indicate that any relative of his or any officer who kept a vigil there spoke a kind word to her. Before she consulted her attorney there was nothing to imply that she thought she could safely rely on an oral gift to establish her title to the car. She was present when it was purchased and knew the bill of sale was issued to Sanders. She also knew that her claim rested in parol and that the title of Sanders was evidenced by a written instrument. The motive that prompted her to consult an attorney would naturally make her shrink from asserting her claim under the circumstances before receiving legal advice. This would account also for the statement that she hated to see the car sold and would buy it if she had the money. When all the circumstances are impartially considered, the inference of good faith on her part is at least as strong as the inference of felonious intent. The prosecution did not meet the requirements of the criminal law. Grand larceny was not proved beyond a reasonable doubt. The circumstantial evidence does not exclude every reasonable hypothesis except the felonious intent of Nellie West. Both de-

fendants should have been acquitted. The county attorney informed the jury that he had adduced all the available evidence. The case, therefore, will not be remanded for a new trial. The judgment of the district court is reversed and the prosecution dismissed at the costs of Gosper county in both courts.

REVERSED AND DISMISSED.

Good, J., dissents.

FRED LISKE V. STATE OF NEBRASKA.

FILED APRIL 25, 1930. No. 27393.

1. **Intoxicating Liquors:** BOOTLEGGING STATUTE. Chapter 77, Laws 1929, construed, and *held* that it is not in conflict with any other of the liquor laws of Nebraska.
2. ———: THIRD OFFENSE: BAR. Inasmuch as the defendant was not informed against under section 3239, Comp. St. 1922, as amended by chapter 77, Laws 1929, he could not, of course, be lawfully tried or sentenced thereunder, but such amendment is not a bar to defendant's arrest and conviction for a third offense under section 3288, Comp. St. 1922, although the first and second offenses were committed prior to the adoption of the amendment.
3. **Statutes:** REPEAL BY IMPLICATION. "Repeals by implication are not favored, and a later act will not be construed as repealing, by implication, a former act where it is possible that they may stand together." *Lingonner v. Ambler*, 44 Neb. 316.

ERROR to the district court for Platte county: LOUIS LIGHTNER, JUDGE. *Affirmed.*

Emil F. Lucky and *M. O. Cunningham*, for plaintiff in error.

C. A. Sorensen, Attorney General, and *Homer L. Kyle, contra.*

HEARD before GOSS, C. J., ROSE, DEAN, GOOD and DAY, JJ., and JAMES and WRIGHT, District Judges.

DEAN, J.

Fred Liske was informed against in Platte county,

December 23, 1929, and there charged with having had in his possession a quantity of intoxicating liquor. The defendant pleaded guilty, and it is shown by the record that this was at least his third offense. Thereupon the defendant was sentenced, pursuant to section 3288, Comp. St. 1922, to imprisonment in the state penitentiary for one year. Subsequently a "motion to correct sentence" was filed, and therein defendant contends that he should have been sentenced under chapter 77, Laws 1929, as a first offender only, the argument being that the court "was without power to enlarge said punishment except for convictions had subsequent to the adoption of said act." The court overruled the defendant's motion, and he prosecutes error.

The information charged that defendant "was on the 24th day of September, 1919, prosecuted and found guilty in the county court of Platte county, Nebraska, of a violation of one of the provisions of the liquor laws of said state, known as chapter 33 of the Compiled Statutes of Nebraska for 1922; and the said Fred Liske was on the first day of December, 1924, found guilty in the district court for Madison county, Nebraska, of a second violation of one of the provisions of chapter 33 of the Compiled Statutes of Nebraska for 1922; and the said Fred Liske was on the 22d day of September, 1925, prosecuted and found guilty in the district court for Platte county, Nebraska, of a third violation of one of the provisions of chapter 33 of the Compiled Statutes for 1922; and the offense charged in this first count of this complaint (the present case) is at least the third offense of the said Fred Liske against one of the provisions of chapter 33 of the Compiled Statutes of Nebraska for 1922."

The defendant's argument is that section 3288, Comp. St. 1922, under which he was sentenced, was amended by chapter 77, Laws 1929, and that all laws in conflict with chapter 77, including section 3288, were repealed. But the argument does not appeal to us. The above chapter 77 amends only section 3239, Comp. St. 1922, commonly known as the "bootlegging" statute, and the amended act does not

refer to any other section of the liquor laws, nor does it conflict with any other section thereof. The defendant's argument appears to be that section 3239, as amended, is a bar to his conviction for a third offense, in that the first and second offenses were committed prior to the amendment of this act. But inasmuch as the defendant was not informed against under section 3239, as amended, he could not, of course, be lawfully sentenced thereunder. The defendant was informed against under section 3247, Comp. St. 1922, which relates to unlawful possession of intoxicating liquor, and he was properly sentenced under section 3288, which covers all penalties for liquor violations except where some other penalty is expressly provided, as in section 3239, relating to "bootlegging."

In an opinion by Judge Irvine, we said: "Repeals by implication are not favored, and a later act will not be construed as repealing, by implication, a former act where it is possible that they may stand together." *Lingonner v. Ambler*, 44 Neb. 316. And in *State v. Omaha Elevator Co.*, 75 Neb. 637, the rule announced in the *Lingonner* case was adhered to. We think the present case comes within the rule above cited.

In view of the statute and of the decisions cited herein, we conclude that the judgment of the district court is right and must be and it hereby is in all things

AFFIRMED.

WILLIAM T. SACKS, APPELLEE, V. BERT H. LYTLE ET AL., APPELLANTS.

FILED APRIL 25, 1930. No. 27165.

1. **Partnership: EXEMPTIONS.** Record examined, and priority of liens and order of payment out of Lytle's share of the net proceeds of the partnership determined.
2. **Judgment.** That part of the judgment of the trial court, dated May 21, 1929, deciding the priority of liens and entering order of payment, is reversed and the cause remanded, with directions to enter decree in harmony with this opinion.

APPEAL from the district court for Cass county: JAMES T. BEGLEY, JUDGE. *Reversed in part, and remanded, with directions.*

Mockett & Finkelstein and *W. A. Robertson,* for appellants.

H. E. Holeman, Dale P. Stough and *J. C. McNerney, contra.*

Heard before GOSS, C. J., ROSE, DEAN, THOMPSON, EBERLY, and DAY, JJ., and LIGHTNER, District Judge.

THOMPSON, J.

This is an ordinary action in equity instituted by Sacks, the appellee, against Lytle, one of the appellants, to settle and wind up the affairs of a "farm lease-partnership," organized on November 13, 1924, in which they were equal partners, by and through a receiver. After the issues between Sacks and Lytle were duly joined and hearing had, the court on February 21, 1929, entered decree finding that the partnership existing between Sacks and Lytle should be dissolved, and a receiver appointed; and ordered the dissolution of such partnership; further, that Sacks have judgment of $2,282.46 against Lytle on four certain promissory notes, but that the priority of this Sacks judgment as a debt against Lytle should be withheld for determination until the final report of the receiver; that A. M. Longman be appointed receiver to collect the assets of such partnership, to receive claims and report the same to the court, upon his taking oath as such receiver and giving bond of $3,000; that on qualifying such receiver be authorized to sell the hogs, live stock and perishable property of the partnership, and report the same to the court. Such decree is in no way challenged.

In harmony with the above judgment, the receiver qualified on March 9, 1929, and on March 13, 1929, he filed his inventory and report. Thereafter on March 19, 1929, the court entered an order authorizing the receiver to sell all the partnership assets.

On March 29, 1929, the other appellants, individual creditors of Lytle, intervened.

At final hearing, May 21, 1929, the court entered judgment and decree of distribution (after making certain deductions here uncomplained of) finding that there was left to be distributed, after all partnership debts were paid, cash in the sum of $4,939.14, one-half of which, to wit, $2,469.57, was the property of Sacks, and the other half ($2,469.57) that of Lytle. As to the Lytle half the priority of liens was found, and distribution decreed to be made in the order and amounts here named: The Bank of Eagle, $250 (which is not complained of); Sacks' judgment against Lytle, $2,282.46; Lytle, $500 for claimed statutory exemption, if any balance of such fund remained; the residue, if any, to the respective interveners in equal priorities. Lytle and such interveners appeal.

While numerous claimed reasons for reversing the judgment of distribution of the trial court are urged by the respective appellants, in our view these may all be reduced to one contention: The court erred in not decreeing Lytle's claimed statutory exemption of $500 the second lien to be paid, the interveners' judgments the third, and Sacks' judgment the fourth.

Considering the rights of these would-be distributees in the order in which they are respectively placed by the trial court: Sacks and Lytle under the "farm lease-partnership" agreement were to each furnish one-half of all the personal property which went into the enterprise. Sacks had on the farm at the date of such agreement, hogs, cattle, horses, mules, poultry, grain, farm machinery, and other things ordinarily used on a farm, of the then agreed value of $2,467.52, and Lytle none. In order that each might have an equal share therein Sacks sold Lytle an undivided one-half interest in what he, Sacks, had and took in payment therefor (as stated in Sacks' petition) Lytle's promissory note in usual form for $1,233.76, due and payable March 1, 1926, on which note there was paid by Lytle on January 16, 1926, the sum of $362. No other payments having been

made, this note was set up in Sacks' petition, and the amount due thereon, as well as that due and unpaid on three other notes, made a part of the petition of Sacks (which latter three notes we find to be but personal obligations of Lytle running to Sacks), formed the basis of the original judgment of $2,282.46 entered, as heretofore stated, on February 21, 1929. Sacks prays that the amount thus found due him be decreed to be a lien on, and first paid out of, the Lytle share of the proceeds before Lytle's exemption is allowed, or any of Lytle's creditors, disconnected with the partnership, are paid. With respect to this contention: Sacks took Lytle's note in payment of the obligation which formed the consideration therefor, and pursued such note to a personal judgment against Lytle. Therefore, Sacks cannot now be heard to say it is the debt of the partnership, or that the partnership property shall be impressed with a lien for its payment, or that he was other than an ordinary creditor of Lytle.

As to Lytle's claimed statutory exemption of $500: His only appearance in the action, after the rendition of the judgment of February 21, 1929 (except to file a motion for a new trial after the entry of decree of distribution), was the filing of an affidavit, in usual form under our statutes, praying that he might be, as head of a family, allowed out of his one-half of the net proceeds of the partnership the sum of $500; that it be declared the prior lien in suit and first paid out of his aforesaid distributive share. Lytle did not plead to the petitions of the interveners, nor to the answer of Sacks thereto. However, as we find, he made application for his exemption timely and in a proper manner, and the same should be allowed.

As to the interveners: On July 21, 1928, the action to wind up this partnership was pending, and so continued. The "farm lease-partnership" agreement, as an entirety, formed an integral part of the petition of Sacks, as a copy of such agreement was attached thereto and made a part thereof. Such petition also included the claimed rights of the parties in and to the properties therein involved, being

the properties covered by the aforesaid "farm lease-partnership" agreement. Nine of these interveners obtained their judgments on February 11, 1929, and on the 13th day of the same month procured their executions and made their levies. The other two interveners recovered their judgments and made their levies at a slightly later date. The total face amount of such judgments of the interveners is $927.63.

Section 8595, Comp. St. 1922, so far as material here, provides: "When the summons has been served or publication made, the action is pending so as to charge third persons with notice of pendency, and while pending no interest can be acquired by third persons in the subject-matter thereof, as against the plaintiff's title." Thus, each intervener, at the time of the recovery of his judgment and attempted levy, and long prior thereto, had constructive notice, binding upon him, as to the matters involved in this lawsuit, all of which were merged in the original judgment so entered herein on February 21, 1929. Then, in their respective petitions of intervention they, in substance, state that they levied on the undivided one-half interest of Lytle in and to specific chattels then on a farm of which Lytle was a renter under a lease with Sacks, but that they did not know the provisions of the lease. Thus it will be seen that they not only had constructive notice of the true status of these properties, by and through the pendency of this action, but actual notice that Lytle was, as to the properties about to be levied upon, the owner of but an undivided interest therein under a lease from Sacks. This actual knowledge, if reasonably and seasonably pursued, would have led to a full knowledge of the true status of these properties. It might further be said that whatever rights accrued to these interveners by reason of their levies, if a right could be said to have at any time existed, were abandoned; as these partnership properties that were levied upon were not sold under the levies, but by the receiver, with the other properties of his trust, and the proceeds commingled with the other trust funds. Further, the value of the specific chattels involved

was not proved by interveners, nor the price at which each article sold shown in the receiver's report. The interveners do not complain of the aforesaid treatment of the chattels levied upon, but on the contrary ask distribution out of the trust fund as an entirety. They stand in the same relation to the fund as does Sacks, that is, that of an ordinary creditor of Lytle. If, in law, the judgment of Sacks and that of these respective interveners stand on a parity as to the fund in question, it follows, in equity, that as the fund will not satisfy each judgment in its entirety a *pro rata* distribution thereof should be decreed. Hence, it is considered by us that the priority of liens and order of payment out of the $2,469.57 (Lytle's share of the net proceeds of the partnership) should be as follows: First, the Bank of Eagle, $250; second, Lytle his $500 statutory exemption; and, third, the remainder to Sacks and these respective interveners *pro rata;* each and all of such payments to be made as of the date of the decree of distribution.

The judgment of the trial court as to the priority of liens, entered May 21, 1929, is reversed and the cause remanded, with directions to enter decree in harmony with this opinion; each party paying his own taxable costs of this appeal.

REVERSED IN PART, AND REMANDED, WITH DIRECTIONS.

IN RE ESTATE OF ROBERT TAGART.
JOHN MURPHY, APPELLANT, V. ESTATE OF ROBERT TAGART, APPELLEE.

FILED APRIL 25, 1930. No. 27104.

1. **County Court: APPEAL: FEES: WAIVER.** In an appeal from the county court in a probate proceeding under a statute providing that it shall be the duty of the probate judge, upon payment of his fee therefor, to transmit to the clerk of the district court a certified transcript of the proceedings, said probate judge may waive the right to demand his fee in advance for the making of such transcript.
2. ——— : ——— JURISDICTION. Where the defeated party undertakes to perfect an appeal from an adverse ruling of the

county court in a probate proceeding, orders a transcript, and the county judge waives the payment of the fee in advance, and states to the appellant that the transcript will be made and filed, but through inadvertence neglects to file the same, and no lack of diligence on the part of the appellant appears, under such circumstances the failure to transmit such transcript to the appellate court will not defeat the appeal.

3. ———: ———: ———. From the facts disclosed, it appears that the appellant, within due time, did all that was legally required of him to do in perfecting his appeal. Under such circumstances, the district court did not lose jurisdiction of the case because the transcript was not filed within the time provided by law.

APPEAL from the district court for Johnson county: JOHN B. RAPER, JUDGE. *Reversed.*

Bartos & Placek, for appellant.

J. C. Moore, contra.

HEARD before GOSS, C. J., ROSE, DEAN, GOOD and DAY, JJ., and CARTER and CHASE, District Judges.

CHASE, District Judge.

On June 12, 1928, there was pending in the probate court of Johnson county proceedings in the matter of the estate of Robert Tagart, deceased. On said date the appellant herein filed a claim in said probate court against said estate claiming that there was due from him from said deceased the sum of $1,025.85. Appropriate objections were filed on behalf of the administrator against the allowance of said claim, the issues were formed, and the matter was heard in the county court and was taken under advisement. On December 4, 1928, the county court entered its judgment dismissing the claim. On December 31, 1928, the appellant presented to the county judge an appeal bond evincing his desire to appeal to the district court from the judgment disallowing said claim. Said appeal bond was approved and filed by the county judge on the 31st day of December, 1928. On December 29, 1928, the county judge received an order from appellant for a transcript of the proceedings. On December 31, 1928, the county judge pre-

pared the transcript. This transcript was never filed in the office of the clerk of the district court within the required time provided by statute. A motion was made in the district court to dismiss the appeal for the reason that the transcript was not filed in time. A hearing upon the motion was had, whereupon the district court dismissed the appeal, and from such judgment of dismissal the appellant prosecutes error to this court.

The appellant contends that he exercised due diligence in demanding the transcript, and that the county judge wrote him that the transcript would be prepared and filed, and that the failure of the county judge to file the transcript is through no fault of the appellant and it was error to dismiss his appeal. This appears to be the only question presented by the record for review in this court.

The evidence is undisputed that the transcript was prepared on the 31st of December, 1928. It appears from the affidavit of the county judge, F. C. Radke, that it was prepared on the 31st of December, 1929. The affidavit appears to have been sworn to on the 27th day of March, 1929, and therefore the date of December 31, 1929, appears to be in error and it doubtless was intended to be December 31, 1928. This being the case, the record is undisputed as to the date the transcript was prepared, which was December 31, 1928.

F. C. Radke, who was then county judge, in his affidavit states that he prepared this transcript on the date stated; that he never notified appellant or his attorney that the transcript was ready and had not been filed; that his term of office was about to expire and he was somewhat confused by the stress of business which occurred just previous to his departure from the office, and that he completely forgot to file the transcript, stating that that was the reason for not filing it.

In the counter showing of appellee, county judge F. C. Radke makes another affidavit in which he states that he caused a transcript for an appeal to be made in this cause and notified the attorney for the claimant that the fee for

the same was $2 and transcript should be delivered upon the payment of the fee.

Judge Radke's term of office expired on January 3, 1929, and Walter P. Campbell succeeded F. C. Radke as county judge of Johnson county, assuming the duties on the 3d day of January, 1929. There appears in the record an affidavit of Judge Campbell in which he states that when Judge Radke delivered the office of county judge to him Judge Radke informed affiant that this transcript had been prepared at the direction of attorney for the appellant, and that the transcript fee of $2 had not been paid, and that said transcript should not be delivered until said fee of $2 had been paid. There also appears in the record a letter written by Judge Radke under date of December 31, 1928, addressed to Bartos & Placek, at Wilbur, Nebraska, attorneys for appellant, which contains the following language:

"In re John P. Murphy claim against Tagart Estate.
"Gentlemen:

"Your letter received. Appeal bond filed and approved this date. Fee for transcript will be $2.00. Filing fee in district court $1.00. Please remit $3.00. Transcript will be made and filed."

There seems to be a rule of general judicial policy favoring the right of a litigant to have his cause determined by the court of last resort unless through some neglect or lack of diligence he has failed to comply with the rules of procedure entitling him to such hearing. It is a fact that this transcript was not filed within the time provided by law. If the trial court acquired no jurisdiction of the cause it properly dismissed the appeal. Then the issue is whether or not the appellant exercised due diligence in his endeavor to have the appeal properly perfected.

The statutes governing appeals from the county court in ordinary civil actions and in probate proceedings differ quite materially. In ordinary civil actions it seems there is no legal duty imposed upon the county judge to do more than prepare the transcript, while the statute regulating appeals in probate matters is as follows:

"When such appeal is taken, the county court shall, on payment of his fees therefor, transmit to the clerk of the district court, within ten days after perfecting such appeal, a certified transcript of the record and proceedings relative to the matter appealed from." Comp. St. 1922, sec. 1475. It will be noted that this statute casts upon the county judge the duty to transmit the transcript to the clerk of the district court within ten days after perfecting such appeal, on payment of his fees therefor. The case cited, *Cheney v. Buckmaster*, 29 Neb. 420, is not authority here, for the reason that that was an ordinary civil action brought before the county judge upon a claim in excess of his justice jurisdiction, and was not in a probate proceeding, and therefore was regulated by a different statute from the one applicable in the instant case. The payment of the fee for making the transcript seems to be, by this statute, a prerequisite to the right of a party to have it transmitted to the district court.

The record is without dispute that the fee was not paid prior to the time fixed by the statute for delivering the transcript to the district court. It is evident that in the passage of this statute the legislature incorporated this clause for the purpose of protecting probate judges from a loss of fees in case there was any question as to the financial ability of the appellant. In *Drexel v. Reed*, 65 Neb. 231, in construing this identical statute, the court said that the right to demand and collect fees in advance could be waived by the county judge. In deciding that case the following language is used:

"This was under a general practice of the county court in such cases not to ask for fees in advance from reliable attorneys. There is no doubt of the correctness of the county judge's statement that nonpayment of fees had nothing to do with this delay. He waived their payment in advance of the service. That he could do so admits of no doubt. The direct reference in the statute to his performing this duty, 'on payment of his fees therefor,' was not intended to place this one on any different footing from

other duties, in respect to prepayment of fees. It was evidently inserted only out of abundant caution to preserve the right to demand them."

Judge Radke, in his affidavit offered by the appellant, states that the failure to file the transcript was not based upon the nonpayment of the fee in advance, but he prepared the transcript and wholly forgot the same because of the necessity of caring for many duties just prior to his departure from his office. This seems to be borne out by the letter herein quoted in which he writes counsel for appellant sending him a bill for the cost of preparing and filing the transcript and states in this letter that the transcript will be prepared and filed. He does not state that the transcript will be held and not filed until the fee is paid. He merely asks attorneys for appellant to remit $3. Then follows the statement that transcript will be made and filed. It seems to us that a reasonable interpretation of this statement is that he waived the payment of fees in advance.

From a consideration of all the evidence presented by the record, we think that the case falls within the rule announced in *Drexel v. Reed, supra,* and that the county judge waived the right to collect the fee in advance, and that appellant from the information he had received from the county judge acted as a reasonable and prudent person would have acted under the circumstances, and had a right to believe that the county judge would transmit the transcript within the time provided by law. This position is strengthened by the fact that the county judge, in one affidavit, states that the failure to file it was because he completely forgot it, and not because the fee had not been paid.

Under the facts as they appear, we reach the conclusion that the appellant had a right to have his case heard by the trial court and a denial of that right constitutes error. The judgment is therefore reversed and the cause remanded.

REVERSED.

IN RE ESTATE OF GUSTAF ROBERT NOREN. FEDERAL TRUST COMPANY OF LINCOLN, APPELLANT, V. ESTHER NELSON, APPELLEE.

FILED APRIL 25, 1930. No. 26614.

1. Trial: WILLS: QUESTIONS FOR JURY. Generally speaking, where the record in a law action contains evidence to support a proposition, and reasonable minds might differ as to whether the proposition is supported thereby, the question is one for the jury. Where, as in this case, competent evidence relating to mental capacity and undue influence is conflicting, the issues of fact are questions for the jury and it is not error for the court to submit such issues.
2. Wills: APPEAL: TRIAL DE NOVO. A defeated litigant in the contest of a will is not entitled to a trial *de novo* on appeal to the supreme court. On such appeal the issues of fact are determined by the sufficiency of the evidence to sustain the verdict of the jury or the findings of the district court. *In re Estate of Kerr*, 117 Neb. 630.
3. ———: ———: SUFFICIENCY OF EVIDENCE. Evidence offered and received on the issue of mental capacity to make a will discussed, and *held* sufficient to sustain the verdict of the jury.
4. ———: ———: ———. On the issue of undue influence presented by the record in this case, evidence considered, and *held* sufficient to sustain the verdict of the jury.
5. ———: UNDUE INFLUENCE: PRESUMPTION. It may be stated generally that, where a testator who is aged and infirm, with his mental faculties impaired, makes a will which is unnatural in its provisions, and in favor of a confidential adviser who is actively concerned in the execution thereof, and who receives substantial and valuable property or rights under the will, there arises a presumption of undue influence, and in such case it devolves upon the beneficiary to overcome the presumption or inference which arises from the proof of these facts by competent evidence sufficient for the purpose.
6. ———: APPEAL: INSTRUCTIONS. Certain instructions claimed by appellant to be erroneous examined and discussed, and *held* to be free from error prejudicial to the substantial rights of appellant. Other instructions requested by appellant and refused by the trial court examined, and *held* properly refused.
7. Trial: INSTRUCTIONS. Mere inexactness in the language of an instruction is not ground for reversal, where the jury were not misled thereby.

8. ———: ———. The supreme court will disregard any error or defect in instructions given, or error in the failure or refusal to give instructions requested, where the same do not affect the substantial rights of the parties.

9. ———: ———. "Error cannot be predicated upon the failure of the trial court to state the entire law applicable to the questions submitted to the jury in one instruction. The charge must be considered as a whole, to determine whether or not the jury have been properly instructed upon all questions which are submitted to the jury for their determination." *In re Estate of Lyell*, 116 Neb. 827.

10. Wills: EVIDENCE: CONTESTANT'S FINANCIAL CONDITION. Evidence of the financial condition of the contestant in a will contest case is properly received and may properly be considered by the jury along with other evidence in the case, as bearing upon the issues of mental capacity to make a will and undue influence in the execution of such will, where such issues are in the case by proper pleadings. Especially is this true where the contestant is in close relationship to the testator and claim is made that the provisions of the will are unnatural.

11. Affirmance. Upon consideration of the whole record, *held* the entire case was properly submitted to the jury, and that the verdict of the jury is sustained by sufficient evidence.

APPEAL from the district court for Lancaster county: WILLARD E. STEWART, JUDGE. *Affirmed.*

John J. Ledwith, Max Towle and *H. N. Mattley*, for appellant.

Wilmer B. Comstock and *Clark Jeary, contra.*

HEARD before GOSS, C. J., ROSE, DEAN, THOMPSON, EBERLY and DAY, JJ., and CHARLES H. STEWART, District Judge.

CHARLES H. STEWART, District Judge.

This is an appeal from a judgment of the district court for Lancaster county, denying probate to an instrument as the last will and testament of Gustaf Robert Noren, deceased.

Gustaf Robert Noren lived for many years on his farm near the village of Waverly, Nebraska. His family consisted of a wife and an adopted daughter, Esther Nelson,

contestant herein. Noren died at his home on June 15, 1927, at about the age of 84 years. His wife died a few months before this. The instrument offered for probate was executed at the city of Lincoln on March 30, 1927. It is in legal form, was signed by Gustaf Robert Noren as testator and was witnessed by five attesting witnesses. This instrument is too long to be set forth in full. It purported to direct the payment of debts; the expenses of testator's last illness and burial, and the expense incident to the administration of his estate.

In the instrument the testator expressed a desire to be buried in the cemetery lot where his departed wife reposed and provided for the erection of a monument at a cost not to exceed the sum of $1,000. By the express terms of the instrument the adopted daughter, Esther Nelson, was given the sum of $1,000 as her own absolutely, and there was given to the Federal Trust Company of Lincoln, Nebraska, as trustee for said adopted daughter, the sum of $5,000, upon terms and conditions providing that such trust company should have power to manage, handle and control said trust fund and semi-annually pay to said adopted daughter the net proceeds thereof. By the terms of said trust, said fund to continue during the lifetime of said adopted daughter and upon her death immediately terminate, and said trust fund in the amount of $5,000 become a part of the residue of said estate. Other provisions practically make the fund a spendthrift trust. Bequests of $1,000 each are directed to be paid to each of two brothers and one sister, and a further bequest of $3,000 is directed to be paid to a niece. Said instrument purports to give, devise and bequeath all the rest, residue and remainder of the estate to the Federal Trust Company of Lincoln, Nebraska, as trustee, upon terms and conditions giving it general power to manage, handle and control said estate; to sell the personal property and if necessary, upon proper order of court, to sell the real estate and invest the proceeds in bonds and securities described in said trust. The trust further directs that semi-annually said trustee shall

pay to Lancaster county, Nebraska, the net income from said trust estate, to be used by said county for charitable purposes in said county. In this connection, request is further made that Lancaster county give personal care to the cemetery lot before referred to. The instrument nominates and requests the court to appoint said trust company executor, and the attorney who drew the will is requested to represent said estate in the administration thereof. By the terms of said trust no bond is required of the trustee. These we think are the important provisions which must be considered in connection with this appeal.

The Federal Trust Company of Lincoln offered this instrument for probate as the last will and testament of Gustaf Robert Noren, and objections were filed by the adopted daughter, Esther Nelson, as contestant. On appeal to the district court for Lancaster county issue was joined on the petition and objections, and a trial was had before the court and a jury. A verdict concurred in by eleven members of the jury was returned for the contestant and against the proponent. Upon this verdict judgment was entered by the court denying probate to the instrument offered as the last will and testament of Gustaf Robert Noren, deceased. Upon the overruling of a motion for new trial, proponent appealed to this court.

In the trial below mental capacity and undue influence were the only issues submitted to the jury. It is claimed by the appellant that a further issue of fact was submitted, but our views on this will be made plain in a later discussion of the instructions.

As we view them, the errors assigned by appellant present but two questions, namely, the sufficiency of the evidence to sustain the verdict of the jury, and the further question of alleged error in the court's instructions. We shall, however, consider one important ruling of the court on evidence offered and received.

It is the claim of appellant that on this record there was no question of fact to be submitted to the jury and that proponent's motion for peremptory instruction in its favor

should have been sustained by the trial court. We shall first consider the evidence by contestant on the issue of mental capacity raised by the pleadings.

At the time the purported will was executed, Noren was at least 84 years old and his physical health was impaired to some extent, not only by the burden of many years, but by reason of severe burns which he received a short time before the instrument was drawn. Death from a complication of disorders followed two months later.

Evidence was offered by the contestant tending to show certain fixed delusions of suspicion and persecution, not concerning strangers, but rather those closest to him in contact, acquaintance and relationship. This evidence is found in the testimony of lay witnesses who were close neighbors and long acquaintances. This is to the effect that, without any foundation in fact and wholly without provocations, Mr. Noren for a number of years before his death harbored deep resentment and manifested great dislike for a brother who lived in the immediate neighborhood. It is related by one witness that at the time of the funeral of Mr. Noren's wife this brother visited the home and expressed natural sympathy for his bereaved brother, and that thereupon Mr. Noren stated that he wished to give the brother a memory verse, and calling for a Bible requested that a minister there present turn to the thirty-fifth Psalm. Assuming that all who may ever have occasion to refer to this opinion are familiar with this particular portion of the old testament, no extended comment will be made, except to say that it is significant that this old man should select this Psalm in which David prays for the confusion of his enemies and asks to be delivered from them. The entire record contains no evidence which even suggests any reason for this feeling.

It further appears from the evidence that in later years Mr. Noren manifested lack of confidence and affection for his adopted daughter, the contestant, in marked contrast to the close and friendly association of the two at an earlier time. This appears to have come about through a belief

on the part of Mr. Noren that false and reckless statements of and concerning him by his daughter had brought him trouble. It nowhere appears in the evidence that any such statements were in fact ever made. This attitude was a marked departure from the intimate and friendly relations existing between Noren and his daughter for nearly 17 years, during which time the daughter remained in the home and was everything a loving and dutiful daughter should be. During these years Noren showed the greatest solicitude for the welfare of this girl and guarded her association with other children to the point where it seemed she was being denied even ordinary freedom in social affairs.

In the year 1896 a will was drawn by Noren and his wife in which, upon the death of Mr. and Mrs. Noren, all of the property was to go to the adopted daughter. By this will, John Warner, a neighbor and resident of Waverly, was appointed guardian for her. This will was witnessed by two citizens of Waverly, Nebraska. In 1926 another will was drawn by Noren in which the adopted daughter was given the sum of $2,000 and no more. This will was prepared by an officer of the Federal Trust Company of Lincoln, Nebraska; was witnessed by parties residing at Lincoln, and in it the Federal Trust Company was named as executor. This will placed the remainder and residue of the estate with said trust company, in trust, upon conditions differing little in general terms from those contained in the instrument under consideration. The third will drawn is the will in controversy.

Evidence was further introduced tending to show that Noren for a number of years before his death entertained groundless suspicions against most of his neighbors and believed they were trying to steal his property. In addition to all this, the evidence shows many acts from time to time on the part of Mr. Noren which would indicate marked peculiarities and eccentricities to say the least.

Finally, it is shown by the record that Dr. Griffith, who qualified as an expert on the subject of mental diseases, in

answer to a hypothetical question propounded to him, stated that in his opinion Mr. Noren on the date the instrument was drawn was of unsound mind. The evidence in this case is voluminous and a more minute analysis at this time is impracticable.

Proponent offered testimony in volume on this question sharply in conflict with that offered by the contestant. It is not, however, for this court to weigh the evidence and determine which party has presented the more convincing proof. The case is not for trial *de novo* here. We are called upon to determine the single question of the sufficiency of the evidence to sustain the verdict of the jury. *In re Estate of Kerr,* 117 Neb. 630.

Where the record in a law action contains evidence tending to support a proposition, and reasonable minds might differ as to whether the proposition is supported thereby, the question is one for the jury. *Zinkula v. Zinkula,* 171 Ia. 287.

Taking into consideration the age of Mr. Noren and his relationship to the contestant and the provisions of the will itself; the circumstances related and opinions expressed by the witnesses on the subject of this man's mental condition at the time the instrument was drawn, we conclude that the trial court was right in submitting this question to the jury, and that the verdict of the jury in this regard is supported by sufficient evidence and should not be set aside.

It is also contended by the appellant that on the question of the exercise of undue influence in this case there is a total failure of proof, and that the trial court erred in submitting this question to the jury. With this we cannot agree. Undue influence as condemned by the law in this class of cases is a subtle thing. Much like crime, it is usually surrounded by all possible secrecy. It is almost always difficult to prove by direct and positive proof. It is largely a matter of inferences from facts and circumstances surrounding the testator, his life, character, and mental condition, as shown by the evidence, and the opportunity

afforded designing persons for the exercise of improper control.

It is the theory of the contestant in this case that the Federal Trust Company of Lincoln, by and through its officers and agents, through the exercise of undue influence upon Mr. Noren at and before the time the purported will was drawn, and at a time when he was physically and mentally unsound, caused him to execute an unnatural will, and not a will prompted by his own intelligent volition.

It appears from the evidence that this company as early as the year 1925 was advising Mr. Noren with respect to his investments; that he sought and received from officers of the company advice and suggestion as to the selection of a bank with which to do business. He appears to have acted upon this advice with the greatest confidence. We have heretofore indicated the activity of the company and its officers in the matter of the formal execution of the will. It must be obvious to any reasonable man that by the terms of the will this company, when it was named trustee of a trust fund amounting to probably $40,000 which it would possess for a long term of years, if not forever, received something of value to it far in excess of any statutory fees which would ever be allowed by the court. It was the very choicest business of a kind it was organized to transact and through the handling of which its chief profit is realized.

It nowhere appears from the evidence that there was any special need for charity in Lancaster county, as distinguished from similar needs in other counties. Nothing in the record suggests that Mr. Noren during his lifetime ever had even a passing interest in matters of either public or private charity.

The will drawn, as heretofore indicated, was unnatural and resulted in direct benefits to the trust company having to do largely with its execution. In this connection, the age and physical condition of this man become most important and the evidence in the record suggesting serious mental trouble is most significant.

It is true that none of the facts and circumstances dis-

closed by the record would, standing alone, be sufficient to warrant the court in submitting the issue of undue influence to the jury, but when all these facts are grouped; when the unnatural provisions of the will are noted; when the age and general state of health and mind of the testator are considered; when the relationship of all the parties is frankly analyzed, and the substantial benefits enuring to the trust company are accurately appraised, it becomes apparent that a real question of fact is raised and that the court properly submitted this issue to the jury.

It is pointed out by appellee in her brief that it is a modern practice of trust companies to interest themselves in the matter of drawing wills for clients. It is a part of their business. We can see no difference between the relationship of such a company and one availing himself of such service and that of attorney and client. In both, special trust and confidence are reposed; the parties are not equally informed or skilled on the subject of their transactions, and unusual opportunity is afforded for the violation of confidence by reason of information freely given in reliance upon the peculiar faithfulness and integrity implied by the relationship. Such a relationship is fiduciary.

We shall now consider the matter of alleged erroneous instructions given by the court on its own motion.

Complaint is made that the trial court, after taking from the jury the question of the due execution of the will by instruction No. 5, resubmitted the same question by parts of instructions Nos. 6 and 13. Instruction No. 6 was a general instruction covering the subject of the burden of proof, and here the court told the jury that the burden of proof was upon the proponent to establish by a preponderance of the evidence "that he (the testator) indicated in some manner in the presence of two or more competent witnesses that he intended to sign the instrument as his will, and that said witnesses subscribed said instrument in his presence." Instruction No. 13 contained this language: "Your inquiry should be directed to the issues before you,

as laid down in these instructions, to wit, whether the will was executed according to law." Instruction No. 5 informed the jury that "in this case every formality prescribed by statute for the execution of a will was observed."

Considered together, these three instructions amount to nothing more than a general statement of the burden of proof in Nos. 6 and 13, and a most explicit statement by the court in instruction No. 5 that in this particular case the proponent had fully sustained this burden. It is our view that the jury could not be confused or misled by these three statements. This situation is little different than that arising from an approved practice of trial judges in stating the strict rule of the burden of proof, and in a separate instruction telling the jury that certain stated facts have been conclusively proved or are undisputed. We find no prejudicial error in the giving of these three instructions.

Objection is made to instruction No. 10 given by the court. This instruction in substance informed the jury that the provisions of the will itself might be considered by them in determining the question of mental capacity, and added: "However, such matters will not alone warrant the presumption of mental incapacity, but are proper to be considered by the jury in connection with other facts proved, bearing upon the condition of the mind of the testator." While possibly not the most guarded and exact in the language employed, this instruction, in view of other instructions given by the court, was a fair statement of the law under the evidence being submitted, and is held to be free from error prejudicial to the substantial rights of the proponent.

"Error cannot be predicated upon the failure of the trial court to state the entire law applicable to the questions submitted to the jury in one instruction. The charge must be considered as a whole, to determine whether or not the jury have been properly instructed upon all questions which are submitted to the jury for their determination." *In re Estate of Lyell*, 116 Neb. 827.

Instruction No. 7 is vigorously assailed on the theory that it improperly places the burden of proof on the proponent on the issue of undue influence. We do not so construe this instruction when considered in connection with other instructions given. Instruction No. 15 given by the court on its own motion deals with the question of undue influence and is as follows: "You are instructed that before influence becomes undue influence to vitiate a will, it must be such as to amount to force and coercion destroying the free agency of the testator and there must be proof that the will was obtained by this coercion and it must be shown that the circumstances of its execution are inconsistent with any hypothesis but undue influence which cannot be presumed but must be proved by the contestants and must be proved by them as having been exercised in connection with the will and not with other things." This was a correct statement of the law applicable to the issue of undue influence generally and in the absence of fiduciary relationship.

Instruction No. 7 complained of is as follows: "You are instructed that while the burden of proving undue influence is upon the contestant, yet if the evidence shows that the person who benefits materially by the proposed will stands in a confidential or fiduciary relation to the testator, then the duty devolves upon the person so benefited, to show that said purported will was not signed by the testator through undue influence."

It may be stated generally that, where a testator who is aged and infirm, with his mental faculties impaired, makes a will which is unnatural in its provisions, and in favor of a confidential adviser who is actively concerned in the execution thereof, and who receives substantial and valuable property or rights under the will, there arises a presumption of undue influence, and in such case it devolves upon the beneficiary to overcome the presumption or inference which arises from the proof of these facts by competent evidence sufficient for the purpose. 28 R. C. L.,

146, and cases there cited; *In re Estate of Paisley*, 91 Neb. 139; *In re Estate of Kubat*, 109 Neb. 671.

In the cases of *In re Estate of Paisley*, 91 Neb. 139, and *In re Estate of Kubat*, 109 Neb. 671, this court cites with approval the following holding in the case of *Carroll v. Hause*, 48 N. J. Eq. 269: "Against a beneficiary having a testator under his control, with power to make his will the will of the testator, especially in a case where the testator has made an unnatural disposition of his property, the law presumes undue influence, and puts upon the beneficiary the burden of showing, affirmatively, that when the testator made his will he did not exercise his power over the testator to his own advantage and to the disadvantage of others having an equal or superior claim upon the bounty of the testator."

Further complaint is made that Instruction No. 11 does not correctly define mental capacity, as applied to cases of this kind. Specifically, error is claimed because said instruction contained the following language: "The kind of mental capacity which the law requires as essential to the making of a valid will is such as enables the person * * * to have a reasonable conception of the value and uses of property or money, and a reasonable conception of how property or money may be employed or enjoyed." Taken as a whole, this instruction fairly defines mental capacity as applied to will cases. The part complained of does not appear in many approved instructions covering the subject. However, the instruction otherwise is sufficient as defining the state of mind essential to the making of a valid will. The added portion complained of modifies the strictness of the rule otherwise stated and could not operate to the prejudice of the proponent in this case. This instruction follows closely one given in *In re Estate of Kubat, supra*, and is in accord with the rules laid down in *Brugman v. Brugman*, 93 Neb. 408.

We have considered appellant's criticism of instruction No. 12 and find it without merit. While not drawn in the exact words of many approved instructions defining "in-

sane delusions," the substance of the instruction is not open to the criticism directed against it. We hold the instruction as given is free from error prejudicial to the substantial rights of the proponent.

Mere inexactness in the language of an instruction is not ground for reversal, where the jury was not misled. *Reams v. Clopine*, 87 Neb. 673.

The supreme court will disregard any error or defect in instructions given, or error in the failure or refusal to give instructions requested, where the same do not affect the substantial rights of the parties. *Maxson v. J. I. Case Threshing Machine Co.*, 81 Neb. 546. The instructions requested by the proponent and which were refused by the trial court, in a general way reflect appellant's theory of this case and it follows from the foregoing that the refusal of the trial court to give such instructions was not reversible error.

Considering the instructions as a whole in this case, we are convinced that they fairly stated the law of the case; that the jury were not misled thereby, and that they were free from error prejudicial to the substantial rights of the proponent.

In the trial of this case, the court, over the objections of the proponent, admitted evidence of the financial condition of the contestant. Such evidence was helpful to the jury in its consideration of the provisions of the will and was competent proof as bearing upon the issue of mental capacity as well as the issue of undue influence. It was proper for the jury to consider this evidence, along with other evidence in the case in determining such issues. *In re Estate of Gunderman*, 102 Neb. 590; *Manatt v. Scott*, 106 Ia. 203; *Stutsman v. Sharpless*, 125 Ia. 335.

For the reasons stated in this opinion, the judgment of the district court is

AFFIRMED.

THOMPSON, J., dissenting especially to the rule as announced in the opinion as to instruction No. 7.

CITY OF LINCOLN, APPELLEE, V. FERDINAND J. FOSS ET AL., APPELLANTS.

FILED MAY 1, 1930. No. 27196.

1. **Municipal Corporations:** ZONING ORDINANCE: BOARD OF APPEALS. Section 9 of the zoning ordinance of the city of Lincoln, providing for a board of appeals and defining their powers examined and *held* not to show on its face that it conferred on the board any delegated authority or arbitrary power, at their own will and without regard to discretion in the legal sense of the term, to give or withhold consent as to persons or places for the carrying on of business in a residence district.
2. ———: ZONING: INJUNCTION. The city may properly bring an injunction suit against defendants carrying on a restaurant or commercial business, in violation of the ordinance, in a district zoned for resident purposes, and, where the ordinance allows a public school in the same district, it will not be said that the suit is wanting in equity merely because the city does not proceed against the school for maintaining in its school building a cafeteria for the use of its pupils.
3. ———: ZONING ORDINANCE: VALIDITY. Zoning ordinance No. 2646 of the city of Lincoln examined in the light of the facts shown in this case and *held* to be constitutional under the police power, having substantial relation to the public health, safety, and general welfare.

APPEAL from the district court for Lancaster county: ELWOOD B. CHAPPELL, JUDGE. *Affirmed.*

Wilmer B. Comstock and *John H. Comstock*, for appellants.

Frank A. Peterson, contra.

Heard before GOSS, C. J., ROSE, DEAN, GOOD, THOMPSON and DAY, JJ., and LIGHTNER, District Judge.

GOSS, C. J.

The defendants appeal from a final decree enjoining them from conducting a restaurant and mercantile business at their home in violation of the provisions of a city zoning ordinance.

The petition for injunction alleged that the city is organized and exists under a home rule charter adopted pur-

suant to the Constitution and attached a copy of the charter as a part of the petition; and alleged that on March 22, 1926, it duly passed ordinance No. 2646, commonly referred to and known as the "Zoning Ordinance," taking effect March 31, 1926, and still in effect, a true copy of said ordinance, including the certificate and map, being attached to the petition. The map shows the zoned classification of each piece of property in the city. The answer of the defendants admitted the foregoing allegations. The petition also alleged, among other things, that, in violation of the ordinance, the defendants, on or about September 17, 1927, established and maintained a restaurant and mercantile business in their dwelling house on the premises under consideration and have as their patrons and customers a large number of pupils attending the public school in the vicinity; that defendants sell to such pupils lunches, sandwiches, candies, and confections which these customers obtain in large numbers in paper wrappings, and with the consent of the defendants remove said wrappings from their purchases on said premises and adjacent thereto and scatter the same, together with such food as they do not consume, about said premises and on the streets adjacent thereto, to the detriment and injury of the property in the vicinity as residence property. The answer of the defendants alleges that they purchased the property and built their home there intending always to use the same exclusively as a dwelling, but thereafter the Irving school was constructed immediately across the street from their home and the natural conduct of school children, described at some length, impaired the market value of their home; that in order to recoup a portion of their loss they made such use of their basement as has been heretofore described in this opinion, but kept no sign indicating that sales were carried on within the premises, that the premises retained their strictly residential appearance, and that nothing was done about said premises which gave to them any aspect of business or affected or conflicted with the character or general atmosphere of the residence neighborhood; that

the zoning ordinance, by its own provisions, or through action of the board of appeals, at other places where there are schools and under conditions similar to this, permits restaurants and candy shops to be operated, and so the ordinance, if not permitting such use of the premises of the defendants, is an unreasonable and arbitrary discrimination against the defendants; that the ordinance is not applicable to nor does it prohibit the use made by the defendants of the premises, because such use does not violate the purpose and spirit of the ordinance but conforms to the conditions and circumstances created entirely by the maintenance of a large school at that place; that, under the conditions, the use of the property is in effect exempted from the operation of the ordinance by reason of the provisions therein attempting, by an unlawful delegation of judicial and legislative authority, to grant to a so-called "board of appeals" the right to recognize exemptions in such a case; and defendants say that all such exemptions must therefore be read into the ordinance without action of the board of appeals, or the entire ordinance be held void; and that the ordinance, if held applicable, and to prohibit the said use of the property of defendants, is arbitrary, unreasonable, and void, and in violation of sections 3, 21, and 25, art. I of the Constitution of the state of Nebraska, and in violation of the fifth and fourteenth amendments to the Constitution of the United States.

We have read the record and find there is little material dispute in the evidence. The defendants are husband and wife. They acquired title to the lot in question by deed dated January 24, 1923. Mrs. Foss testified that she was the exclusive owner, but the deed in evidence ran to both as tenants in common. This is not material as both were parties. That year they built a home and double garage and made other improvements on the lot. The total cost of the lot and improvements was $9,800. The property is at the southeast corner of Woodcrest and Twenty-second streets. The home faces north and is known as 2201 Woodcrest. The neat two-storied brick and stucco house is on

a terrace about five feet above the grade of Twenty-second street. Irving Junior High School is located across the street west of the Foss home. The school grounds occupy the equivalent of four city blocks. The building is located on the eastern part of the tract, is 313 feet east and west and 189 feet wide. At the time of the trial there were 911 pupils in attendance. The school board acquired the property in 1920, erected the building in 1926 and 1927, and it was opened for school purposes on September 12, 1927. On September 17, 1927, Mrs. Foss applied for and secured from the agricultural department of the state a certificate of registration to conduct a restaurant at the family home. A year later the certificate was renewed for another year. The intent in securing the certificate was to comply with state regulations, and not to conduct a public restaurant. The purpose was to cater to the pupils from the school. The evidence does not indicate that the appellants intentionally departed from this purpose. For a considerable time they served the pupils with hamburger sandwiches, candy, pop, and the like, served from the back door for a time and later from the garage. When cold weather set in they let the children go through the house to the basement to eat. Sometime during the first year they remodeled the basement. They cut the terrace and the wall on the west side of the house and made an entrance to the basement from the street. The pictures in evidence show a neat entrance, with sidewalls of masonry through the terrace and with a paved walk from the curb to the basement door. The basement is plastered, is furnished with a few tables and with a showcase to protect the merchandise carried for the pupil customers. The cooking is done in the basement. Candy sales run from $5 to $10 a day. In warm weather they sell from 24 to 36 bottles of pop a day. They have four small tables and serve about 30 each day with food. They purvey hot lunches of mashed potatoes, gravy, meat loaf, salmon loaf, and baked beans. The evidence shows that for a long distance north, south and east is a high class, exclusively residential neighbor-

hood. Except for the school the same condition prevails to the westward. In this locality the deeds appear to carry restrictions as to setbacks from the street and as to the minimum values of improvements to be permitted. This is stated merely for whatever bearing it may have on the reasons for fixing zoning provisions and of the reasonableness of the provisions as fixed.

The zoning ordinance consists of 13 sections. The first section divides the city into five classes of districts—residence, apartment, local business, commercial, and industrial. The third section defines the use to which buildings in the residence district may be put and prohibits any other use. The permissible uses do not allow a restaurant in a residence district. They do allow a school. Section 11 of the ordinance declares each section and subdivision of a section independent of every other so far as inducement for the passage is concerned; and that the invalidity of one shall not invalidate another.

A map attached to the ordinance and made a part of it shows that the residence of the defendants was and has been, from the time the ordinance went into effect, located in a residence district. The evidence clearly indicates that it is used as a restaurant contrary to the terms of the ordinance, and that such use did not begin until more than a year after the ordinance became effective. If the ordinance is valid, the facts pleaded and proved in this case are sufficient to prevent the use of the property by the defendants for restaurant purposes.

Section 9 of the ordinance provides for a board of appeals consisting of the city engineer and the five members of the city council. It provides for an appeal from the refusal of the building inspector to grant a building permit, provides that the building inspector may, on application for a permit, request the board for an interpretation and application of any provision of the ordinance, and provides also that the board shall have power to adopt rules and regulations from time to time to carry into effect the provisions of the ordinance and to interpret its provisions so as to

carry out the intent and purpose of the plan. These powers are all made subject to the power and to the final action of the city council. The section provides adequately for an appeal to the council.

The appellants argue that this section of the ordinance is unconstitutional and void because it delegates legislative and judicial power to a board of appeals without any rules to guide it. On the facts at bar that objection in the terms in which it is made affords no help to appellants, because, as we find the facts, the board of appeals as such had nothing to do with the zoning of this particular property. It appears that in the ordinance this was zoned in the residence district. But the appellants seek to aid the above stated proposition as to the delegation of power by the further proposition that the ordinance thus authorizes discrimination between citizens in respect to the enjoyment of property. That power of discrimination, they argue, is inherent in the authority granted the board of appeals to use their arbitrary power, without regard to a reasonable legal discretion, to allow one to carry on a restaurant business in a residential district but to refuse it to another in similar circumstances.

The leading case cited by them is *Yick Wo v. Hopkins*, 118 U. S. 356 (decided in 1886). Ordinances of the city of San Francisco made it unlawful to carry on a laundry within the corporate limits "without having first obtained the consent of the board of supervisors, except the same be located in a building constructed either of brick or stone." Plaintiffs were convicted of violations of these ordinances by operating laundries in wooden buildings. They were discharged on writs of habeas corpus by order of the supreme court of the United States. That court very properly held that the ordinance was unconstitutional on two grounds: First, in its administration, as shown by the facts, it "makes arbitrary and unjust discriminations, founded on differences of race, between persons otherwise in similar circumstances;" second, it shows on its face that it conferred arbitrary power upon the munici-

pal authorities "at their own will, and without regard to discretion in the legal sense of the term, to give or withhold consent as to persons or places, without regard to the competency of the persons applying, or the propriety of the place selected, for the carrying on of the business." In the course of the opinion the court touched the vice of the ordinance when it said: "They (the ordinances) seem intended to confer, and actually do confer, not a discretion to be exercised upon a consideration of the circumstances of each case, but a naked and arbitrary power to give or withhold consent, not only as to places, but as to persons." The appellants cite other cases from state courts to the same general effect. The principle is sound. The question here is whether it is applicable.

We find nothing in the body of section 9 of the ordinance nor elsewhere, nor have appellants pointed out anything either in the ordinance or in the practice of the board, that suggests any exercise of delegated authority or any favored treatment of one citizen or of any single piece of property as compared with any other citizen or any other property. The ordinance and the map seem to show that all lands and lots within the city limits were zoned. The application of the zoning principle to the home of the appellants was by virtue of the ordinance duly passed by the city council itself under and by virtue of the home rule charter of the city. There was no act by the board of appeals. The section adjures them "to carry out the intent and purpose of the plan." We are of the opinion that section 9 of the ordinance has not been shown, in the circumstances of this cause, to be unconstitutional in this phase. If the power claimed by the appellants to be delegated to the board of appeals should be exercised in an arbitrary or discriminatory way as to parties, classification of business, or as to different real properties in the same general situation, then will be the time to pass upon that feature of the ordinance.

In the second point of their argument the appellants assert that the city, by seeking this injunction, has shown an interpretation of its zoning ordinances which makes its

provisions arbitrarily discriminatory. This point relates to the fact, appearing in the evidence, that in the junior high school, just across the street, the board of education maintains, during the school year, a well-equipped cafeteria where about 600 of its 911 pupils—all who desire it —are furnished lunches at cost. The school district is an entity, distinct and separate from the city. The district and the city are not coextensive. The district comprises all of the city and more. Its taxes are not only levied but are collected by the county authorities. The officials of the district were probably in sympathy with the suit. As shown by the evidence, at least one member of the board of education and some of the teachers believed that the operation of the restaurant by the appellants was injurious to the discipline of the school and not helpful to the health, safety and welfare of the pupils. It created an extra hazard in the crossing and recrossing of the street by the pupil customers of the restaurant. But it cannot be argued with much plausibility that the city is not the real party in interest here and that it does not come into a court of equity with clean hands when it asks that the appellants be enjoined from violating the ordinance, even though the school board favors the suit and even though it operates a cafeteria in the same neighborhood.

The city has a real interest in the enforcement of all proper ordinances regulating building and zoning of property within the corporate limits. We see no good reason why it may not act to further the interests of any citizen or legal entity when those interests coincide so vitally with its own. If, on the other hand, the board of education is violating the zoning ordinance by maintaining a cafeteria within an area restricted against such an activity, the city could not join it with the appellants. Moreover, the ordinance does not prohibit schools within a residence district. The school property was purchased by the board of education years before appellants purchased theirs and six years before the property was zoned. There may be presented good reason and authority for saying that among the pro-

gressive things of this age the serving of lunches to pupils by the school authorities is a proper function of a board of education. It affords proper food and time to eat it to those pupils whose homes are too remote to allow them to go there for the usual midday meal. It fits into the subject of education on the line of home economics. It assists the spirit of social democracy in a way that was unknown a generation ago. We have always had in our public schools, to a greater or less extent, the democracy of study and of play. Now we have the democracy that comes from the meeting of pupils of all classes at the lunch table.

We do not undertake to decide a case in which a party is not before the court. While we do not decide the ultimate merits of any future controversy between the city and board of education over the right to operate a cafeteria in a public school, yet it is proper here, in view of the issues raised by the appellants, to refer briefly to the law in other jurisdictions. In *Harvard College v. Assessors of Cambridge,* 175 Mass. 145, it was held that the use of real estate owned and furnished rent free by the college for the use of students who club together for the purpose of obtaining, with the assistance of the college, food at cost, does not subject the real estate to taxes when the revenue laws exempt property used for college purposes. In *City of Chicago v. University of Chicago,* 228 Ill. 605, it was held that dormitories, dining halls and club houses located upon a college campus, used for conducting the educational work of the university, and not for gain, are well within the meaning of an ordinance remitting water rates to all buildings used for educational purposes. In a case relating to a zoning ordinance (*Western Theological Seminary v. City of Evanston,* 325 Ill. 511) it was held that a provision allowing schools and colleges to be erected in a residence district permitted the erection of dormitories where students would use a students' common or dining room. Whatever may be the attitude of the city of Lincoln in any controversy between it and the school district, or whatever may be the opinion of this court if and when such a contro-

versy come to us, we cite the above cases merely to exempt the city from any conclusive suggestion of bad faith or discrimination in any legal sense in not prosecuting the school district for running a cafeteria while it enjoins the appellants from operating a restaurant.

The remaining point argued by appellants is that the police power cannot be invoked here to sustain the application of the ordinance. Regulating the uses to which real property in cities may be put is a matter of comparatively recent origin. The zoning of cities in this country began well within the present generation. Naturally it had its origin in our state more recently than in some of the older states where the problems of varied industries and business and a more congested population emphasized the need for regulation and found a justification in some aspect of the police power asserted in the interests of the welfare of the public. It is difficult, if not impossible, to lay down any general rules describing the exact field of operation of such power that will fit cases arising in the future. Each must be controlled by the special conditions and circumstances surrounding it. It must be controlled by constitutional principles, the meaning of which does not change but the application of which to new conditions varies with the everchanging conditions of a growing civilization.

For examples of the cases we have had where zoning laws were passed upon: In *State v. Edgecomb,* 108 Neb. 859, it was held that a zoning ordinance was unreasonable as applied to the particular circumstances of that case because it denied the right to a church to erect its edifice upon its own lots for the sole reason that the building would cover 37½ per cent. of the area while the ordinance limited the area to 25 per cent.; and in *Pettis v. Alpha Alpha Chapter of Phi Beta Pi,* 115 Neb. 525, it was held that the police power would sustain an injunction against the use of a residence by a college fraternity in violation of the classification of such property in a zoning ordinance. This latter decision received much of its support from *Village*

of Euclid v. Ambler Realty Co., 272 U. S. 365, in which that court reversed a decree of the district court enjoining the enforcement of a zoning ordinance. We content ourselves with quoting one sentence therefrom: "The police power supports also, generally speaking, an ordinance forbidding the erection in designated residential districts, of business houses, retail stores and shops, and other like establishments, also of apartment houses in detached-house sections, since such ordinances, apart from special applications, cannot be declared clearly arbitrary and unreasonable, and without substantial relation to the public health, safety, morals, or general welfare."

Under the authority of our own holding in the *Pettis* case and of that of the supreme court of the United States in the *Euclid* case, we are of the opinion that the zoning ordinance as appealed against here is not unconstitutional. It is sustainable under the police power as having substantial relation to public health, safety, and general welfare.

For the reasons stated, the judgment of the district court is

AFFIRMED.

JOSEPH J. LUTHER, APPELLEE, V. FARMERS UNION COOPERATIVE ASSOCIATION, APPELLANT.

FILED MAY 1, 1930. No. 27351.

1. Trial: QUESTION FOR JURY. The general rule is that, where there is a substantial conflict in the evidence upon a material matter and when different minds may honestly draw different conclusions from the evidence, the question is for the jury.
2. ———: REQUEST FOR INSTRUCTION. "If either party desires an instruction which would serve only to guide the jury in weighing certain features of the evidence in connection with the issues, he must request such specific instruction. The proper time to make the request is when the evidence is concluded, and the proper manner of making it is by submitting in writing the instruction desired." *Osborne v. State*, 115 Neb. 65.
3. ———: ———. "Before error can be predicated upon the failure to charge the jury upon a given point, there must have been

a request therefor, unless it is upon a question where a statute or positive rule of law requires the giving of such instruction." *Marshall v. State*, 116 Neb. 45.

APPEAL from the district court for Lancaster county: FREDERICK E. SHEPHERD, JUDGE. *Affirmed.*

Wilmer B. Comstock and *John H. Comstock*, for appellant.

Max V. Beghtol, contra.

Heard before GOSS, C. J., ROSE, DEAN, GOOD and DAY, JJ., and JAMES and WRIGHT, District Judges.

DAY, J.

This is an action to recover damages for personal injuries. From a verdict and judgment in favor of the plaintiff, the defendant appeals.

The first of the two errors assigned and argued is that the verdict is not sustained by sufficient evidence. The petition of the plaintiff alleges that the defendant owns and operates a grain elevator; that as a part of its machinery it maintained a dump and driveway for unloading wagon-loads of grain, which were so constructed that a wagon loaded with grain and drawn by horses is placed upon a movable platform in such a manner that a mechanical operation depresses the rear of the wagon and elevates the front so that the grain is unloaded by gravity; that during the operation it was necessary for the plaintiff in unloading said grain to cause his horses to stand on a narrow bridge elevated from the natural surface of the ground about two feet; that the gasoline engine operating the elevating machinery was near where the horses stood, so that the noise was intensified at that point; that the defendant maintained two large blocks of concrete so located that, if an unloaded wagon deviated from a direct line in driving out, the wheels would strike the blocks; that on the 19th of July, 1927, while the plaintiff, at the invitation of the defendant, in the exercise of due care, was unloading wheat, one of his team stepped off the

bridge, became frightened, and ran upon these stone blocks, tipping the wagon and throwing the plaintiff from his seat, thereby inflicting serious injuries. It is further alleged that the defendant was negligent in failing to provide a place of sufficient width on which to permit the horses to stand, or to maintain a guard-rail to prevent the horses falling from the bridge. The answer of the defendant admits the ownership of the elevator, and that the plaintiff was injured; but it alleges it was caused by the negligence of the plaintiff, in that he lost control of his team; that the plaintiff knew the team to be vicious and unruly before he drove into the elevator, and that if the plaintiff had exercised ordinary care in selecting the team or in driving into the elevator said accident would not have occurred. It is also alleged that the plaintiff was familiar with the elevator and all its apparatus, including the dump, bridge, engine house and rocks.

The plaintiff introduced evidence to support his allegations of negligence as hereinafter set out. Upon the day in question, the plaintiff was delivering grain to the defendant's elevator. He drove his wagon onto the dump for the purpose of unloading his wagon, with his team standing upon the bridge which connected the elevator with the driveway on which the unloaded wagon left the elevator. This bridge was 12 feet wide and 5 feet across and was elevated 22 inches from the ground. The dumping device was inclosed in an annex attached to the elevator building and the bridge was just outside of this covered part. The bridge was about two feet wider than the door, but the door was not in the center of the bridge. The bridge extended about six inches beyond the door to the south. There was no rail on this bridge. It was here the plaintiff's horse stepped off. About 10 feet to the east of the bridge were two rocks about one and one-half feet square and located about three feet from the wagon track of the exit driveway. The construction of the elevator was such that the gasoline engine which operated it had an exhaust out of the top of a small outbuilding at a place

which was approximately even with the horses' heads while standing for the dumping operation. There is evidence in the record tending to prove that in the proper construction of grain elevators the engine is located on the other side away from the horses, and that the bridge should be guarded by a rail to prevent the horses from stepping off. There had been trouble with horses becoming frightened at this elevator before and the men in charge of its operation had refused to stop the engine when other customers had complained that it frightened their horses. The plaintiff, himself, testified that the accident happened as follows: "Well, as the grain was running out—the engine scared them in the first place, being right in front of them, and when this started the machinery it began looking behind it and immediately pranced around and kind of stepped back, and he stepped off with his hind foot off of the bridge on the south side, and then in order to keep from falling he lunged ahead, and I had to give slack on the lines or it would have jerked me off the wagon, and before I could get the slack up it hit those rocks and throwed me off of the seat." "My going over those rocks threw me off."

It is the duty of the owner of property to exercise reasonable care to maintain it in a safe condition. *Perrine v. Union Stock Yards Co.*, 81 Neb. 790. There is evidence in this case to prove that the driveway through the elevator was not safe; that there was no guard-rail provided for the bridge; that customary and proper construction requires such a guard-rail; that the gas engine for operating the machinery of the elevator was located in a place that was not proper or customary in grain elevators; that its location was such as to be likely to frighten horses while wagons were being unloaded; that horses had been frightened in said elevator; that horses had been frightened by said engine; that rocks were laid upon the driveway so that a slight deviation from the track might tip a wagon in driving out. There is also evidence in conflict. All this raises a question of fact as to whether or not the owner of such elevator had exercised reasonable care to maintain it in a safe condition for persons using it.

It is argued by the appellee that, since this case was heretofore before the court, the previous decision became the law of the case. At the same time it is argued by the appellant that the evidence on the second trial is not identical with that of the first. This question presents some difficulty of determination where the assignments of error are that the evidence does not sustain the verdict. We have, however, examined this record fairly and completely, to determine whether or not the evidence in this case, now before the court, sustains the verdict, and we find that it does. Certainly such a situation presents a question of fact which would justify the jury in drawing an inference of negligence. The general rule is that, where there is a substantial conflict in the evidence upon a material matter and when different minds may honestly draw different conclusions from the evidence, the question is for the jury. *Henry v. Omaha Packing Co.*, 81 Neb. 237; *Craig v. Chicago, St. P., M. & O. R. Co.*, 97 Neb. 426.

The second assignment of error is that the court erred in overruling the motion of defendant to instruct the jury "that the testimony read from the bill of exceptions at the former trial shall not be considered by the jury as substantive evidence in this trial, and that it only goes to the credibility of the witness." Mr. Kuse, the manager of the elevator, was called as a witness for the defendant at the trial. In the course of his cross-examination by counsel for the plaintiff, he was interrogated concerning testimony given by him upon the former trial. The testimony given by him at the former trial was read to the jury for the purpose of impeachment. The witness admitted having made some of the statements attributed to him, denied others, and qualified some. The plaintiff offered in evidence from the bill of exceptions from the first trial the questions and answers showing the statement which the witness had denied. After such testimony had been introduced, the attorney for the defendant orally requested the court to direct the jury, specifically, "that this testimony read from the bill of exceptions of the former trial

shall not be considered by the jury as substantive evidence in this trial, and that it only goes to the credibility of the witness, Mr. Kuse, in this trial." At the proper time the defendant requested that six certain instructions be given by the court in this case, but did not request this one except by an oral motion at the time the evidence was introduced and before the testimony was concluded. While it is the duty of the trial court without a request and on its own motion to instruct the jury as to the general rules of law applicable to the issues of the case, it is also the rule that, if a party to a suit desires more specific instruction upon a point concerning one of the issues of the case, it is necessary for him to direct the attention of the trial court to the proposition by requesting such an instruction in writing. We have held: "If either party desires an instruction which would serve only to guide the jury in weighing certain features of the evidence in connection with the issues, he must request such specific instruction. The proper time to make the request is when the evidence is concluded, and the proper manner of making it is by submitting in writing the instruction desired." *Osborne v. State,* 115 Neb. 65. "Before error can be predicated upon the failure to charge the jury upon a given point, there must have been a request therefor, unless it is upon a question where a statute or positive rule of law requires the giving of such instruction." *Marshall v. State,* 116 Neb. 45, citing *Georgis v. State,* 110 Neb. 352. See, also, *Grosh v. State,* 118 Neb. 517, which cites *Osborne v. State, supra.* It therefore becomes evident that the defendant did not make a request for more specific instruction in this case at the proper time, nor in the proper manner, and therefore it was not error for the court to omit giving such instruction.

Conformable with the foregoing opinion, we find no prejudicial error in the record, and the judgment of the trial court is

AFFIRMED.

ELMER J. WORTMAN, APPELLANT, V. JOSEPH P. ZIMMERMAN ET AL., APPELLEES.

FILED MAY 1, 1930. No. 27123.

1. **Appeal**: REQUESTED INSTRUCTION: REVIEW. Where an instruction is given upon an issue submitted to the jury at the request of a party to a suit, he will not be heard to say that there was no evidence upon which to base the instruction.
2. **Trial**: INSTRUCTIONS. Instructions given to a jury must be construed together, and if, when considered as a whole, they properly state the law, it is sufficient.
3. ———: VIEW OF RES. The refusal of the trial court to permit the jury to view an automobile involved in a collision that is the basis of a suit for damages is not reversible error in the absence of an abuse of discretion.
4. **Negligence**: QUESTION FOR JURY. The issue of contributory negligence in a law action is one of fact for the jury, when the evidence relating thereto is in conflict or different inferences of fact may be reasonably drawn therefrom.
5. ———: ———. Where, in an action for damages arising from a collision between two automobiles at a highway intersection, there is evidence that the car in which plaintiff was riding had had the body removed and a box six or eight inches in height built thereon; that it also had a crated bathtub lying crosswise of the car on the edges of the box and wired in place; and further that plaintiff was sitting on top of the crated tub at the time of the collision, *held*, that under such circumtances the question whether plaintiff's negligence was the proximate cause of the accident or that it was more than slight in comparison with the negligence of the defendant within the meaning of the "Comparative Negligence Statute," is a question for the jury.
6. **New Trial**. The overruling of a motion for a new trial on the ground of newly discovered evidence is not ordinarily error, where the record discloses that the new evidence is of a cumulative or impeaching character.
7. **Evidence** examined and *held* to be sufficient to support the verdict of the jury.

APPEAL from the district court for Gage county: FREDERICK W. MESSMORE, JUDGE. *Affirmed.*

Dort, Cain & Witte, for appellant.

Jack & Vette, Sanden, Anderson, Laughlin & Gradwohl, and *Frank A. Dutton, contra.*

Heard before GOSS, C. J., ROSE, DEAN, GOOD and DAY, JJ., and CARTER and CHASE, District Judges.

CARTER, District Judge.

This was an action brought by Elmer J. Wortman to recover damages for personal injuries sustained and alleged to have been caused by the negligence of the defendant Maude Belle Zimmerman in so operating her automobile as to cause a collision with the automobile in which plaintiff was riding and inflicting severe injuries to plaintiff's head and back, for which he asks judgment for the sum of $42,497.50.

The answer denies that the defendants were negligent, alleges the contributory negligence of the plaintiff, and alleges further that plaintiff was riding with one Oluf Rasmussen at the time of the accident, that plaintiff and Rasmussen were engaged in a joint enterprise at the time, that the negligence of Rasmussen caused or contributed to the injury, and that because of such fact the plaintiff could not recover.

The issues of fact were submitted to a jury; the verdict and judgment was for defendants, and plaintiff appeals.

The evidence discloses that on the morning of October 16, 1927, the plaintiff, Oluf Rasmussen and Carl Anderson left Lincoln, Nebraska, for Ruskin, Nebraska, in a Ford automobile, the body of which had been removed and a box six or eight inches high built thereon. The automobile was loaded with plumbing fixtures and supplies, including a bathtub and lavatory. The crated bathtub was laid across the truck behind the driver's seat and wired in place. Plaintiff sat on top of the crated bathtub and Rasmussen and Anderson sat in the seat, with Rasmussen driving. While occupying these positions and pursuing a westerly course on the Goldenrod Highway just north and west of the village of Ellis, Nebraska, the car in which plaintiff was riding was struck at an intersection by an automobile being driven by the defendant Maude Belle Zimmerman, the wife of the other defendant Joseph P. Zimmerman.

The testimony for plaintiff is to the effect that the Ford car was traveling 20 to 25 miles an hour and that defendants' car was traveling 35 miles an hour and that the Ford car was struck after it had entered the intersection.

Defendant Maude Belle Zimmerman testified that she stopped her car just before arriving at the intersection to allow another car to pass; that she saw the Ford car coming from the east at a rate of speed of 35 miles an hour; that she started across the intersection at a rate of speed of 10 miles an hour, and was struck by the Ford car just after she entered the intersection. Mrs. Zimmerman also testified that she saw plaintiff thrown from his seat on top of the crated bathtub.

The acts of negligence complained of are: That Mrs. Zimmerman was driving at an unlawful and reckless rate of speed; that she failed to keep a proper lookout for danger when entering the intersection; that she failed to give any warning of her intention to enter the intersection; that she turned her car to the right instead of to the left in attempting to avoid the collision; and that she failed to keep her car under control.

It is further disclosed that the plaintiff had been engaged in the dray business for a period of years preceding the accident and had on several occasions employed the witness Rasmussen to work for him on small jobs. The witness Rasmussen was engaged in the plumbing business at Ruskin and had been so engaged for several years. It appears from the evidence that some time prior to the accident plaintiff had made arrangements with Rasmussen to install some plumbing fixtures in plaintiff's home, including the bathtub and lavatory. On the morning of October 15, 1927, Rasmussen went to Lincoln to get some plumbing supplies and fixtures and was accompanied by plaintiff at Rasmussen's invitation. The evidence of both plaintiff and Rasmussen was to the effect that plaintiff had previously selected the fixtures he desired from a catalogue and that plaintiff accompanied Rasmussen for the purpose of attending the Nebraska-Grinnell football game in the after-

noon. Plaintiff left Rasmussen shortly after arriving in Lincoln and they had not again met until 5 or 6 o'clock that evening, at which time all the plumbing fixtures and supplies were loaded in the Ford car and ready for the return journey. Among the fixtures loaded in the car were a bathtub and lavatory which Rasmussen intended to install in plaintiff's home. Rasmussen paid for the gas and oil used on the trip, but the evidence does not disclose who paid the personal expenses of the two while they were together in Lincoln.

The plaintiff (appellant here) contends that any negligence shown on the part of the witness Rasmussen, the driver of the Ford automobile, is not imputable to plaintiff, and that the court erred in submitting the question of joint enterprise. The instruction referred to is as follows:

"The court instructs the jury that, if you find and believe from the evidence that Oluf Rasmussen was driving the automobile in which plaintiff was riding at the time and place of the collision, and that the said Rasmussen was then and there guilty of carelessness and negligence in that connection and which is shown by the evidence in the case, and which caused or contributed to cause the collision, said carelessness and negligence of the said Rasmussen, if you find he was careless and negligent, is not to be imputed to the plaintiff or held against his right to recover herein, unless you further find and believe from the evidence that the plaintiff and the said Rasmussen were engaged in a joint enterprise. By joint enterprise is meant not merely that they were riding together in the same vehicle. Parties cannot be said to be engaged in a joint enterprise, within the meaning of the law of negligence, unless there be a community of interest in the objects and purposes of the undertaking and an equal right to direct and govern the movements and conduct of each other in respect thereto."

The plaintiff complains that there was no evidence upon which to base this instruction. Whether or not the evidence is sufficient, we need not decide, for the reason that the instruction given is exactly the same instruction as re-

quested by the plaintiff. Having himself asked the court to submit this issue to the jury, he cannot now complain. The foregoing instruction assumes that there was evidence before the jury from which they could find that plaintiff and the witness Rasmussen were engaged in a joint enterprise. If such evidence was adduced (and in view of the instruction we must presume that there was), then the jury would be justified in finding that plaintiff and the witness Rasmussen were engaged in a joint enterprise and in imputing the negligence of either to the other. It is the rule in this state that, where an instruction is given upon an issue submitted to the jury at the request of a party to a suit, he will not be heard to say that there was no evidence upon which to base the instruction. *Waters v. Nebraska Mutual Ins. Co.*, 108 Neb. 1; *Farmers Bank of Nebraska City v. Garrow*, 63 Neb. 64; *American Fire Ins. Co. v. Landfare*, 56 Neb. 482.

The plaintiff also complains of the giving of other instructions by the trial court. A careful examination shows that all are correct statements of the law applicable to this case. Some of the grounds for objection are highly technical, but in considering the instructions as a whole they correctly and fairly state the law of the case. We are unable to find any reversible error in any of the instructions given.

The plaintiff also complains of the ruling of the trial court in excluding from the evidence a view of the Ford car. Under the law of this state, the viewing of property that is a subject of litigation by the jury is discretionary with the trial court. We believe the same rule should be applied in a case of this character. Clearly there is no abuse of discretion in the case at bar and the error alleged is without merit. *Alberts v. Husenetter*, 77 Neb. 699; *Beck v. Staats*, 80 Neb. 482; *Robison v. Troy Laundry*, 105 Neb. 267.

Plaintiff also complains that under the record and the law of this case plaintiff is not shown to have been guilty of any negligence to bar his right of recovery. Regardless

of the question of any imputed negligence, the jury could have found under the evidence that plaintiff was guilty of contributory negligence. The evidence is undisputed that plaintiff was riding on a crated bathtub which had been wired to the truck crosswise behind the seat. Under such a state of facts, it was for the jury to determine, after taking into consideration all the facts and circumstances, whether or not plaintiff was guilty of contributory negligence. Where the evidence is conflicting or different inferences of fact may be reasonably drawn therefrom, it is a question for the jury whether the guest or occupant of the motor vehicle was guilty of contributory negligence; and only in cases where the evidence is insufficient to carry the issue to the jury, or where the evidence is uncontradicted and the inference to be reasonably made therefrom is clear, is it for the court to rule as a matter of law with reference to the alleged contributory negligence of plaintiff or as to his liability for the contributory negligence of the driver. *Willis v. Schertz,* 188 Ia. 712.

In a recent case decided by the supreme court of Michigan involving a like case, the court in its opinion say:

"Most of the foregoing discussion applies to the claim that plaintiff was guilty of contributory negligence. One additional claim is made, however, that plaintiff was guilty of contributory negligence because he was riding on the running-board, and that he might have avoided injury by stepping off. The five seats in the Buick were taken by other workmen, and he had ridden some distance in an uncomfortable position, and he desired to rest himself for a time, so he got out and rode upon the running-board. As he stood there on the running-board, he was watching the traffic coming from the west, and the driver of the Buick was watching traffic coming from the east. It is within the province of a jury to say whether plaintiff, under such circumstances, might have stepped off and avoided the injury, but the court cannot say so as a matter of law." *Anderson v. Detroit Motorbus Co.,* 239 Mich. 390.

The court having properly submitted to the jury the questions as to whether the contributory negligence of the plaintiff was the proximate cause of the injury, and whether the contributory negligence of plaintiff was of such a nature as to bar a recovery under the "Comparative Negligence Statute," there being sufficient evidence in the record to support the verdict returned, the contention of plaintiff that the verdict of the jury is not supported by the law and the evidence is not sustainable.

The plaintiff next contends that the court erred in not sustaining plaintiff's motion for a new trial upon the ground of newly discovered evidence. We have carefully examined the affidavits in support of the motion for a new trial and find the contents thereof are of a cumulative and impeaching character. None of the parties making affidavits were present when the acts occurred; none of the new evidence that plaintiff offers to show is of such a controlling character as to probably change the verdict; and under such circumstances the trial court did not err in overruling plaintiff's motion for a new trial on the ground of newly discovered evidence.

There being no error in the record, the judgment is

AFFIRMED.

C. D. RIDENOUR V. STATE OF NEBRASKA.

FILED MAY 1, 1930. No. 27259.

1. **Larceny: STOLEN PROPERTY: POSSESSION: PRESUMPTION.** "Under the doctrine announced and held in this state, no presumption of guilt arises from the mere possesson of stolen property; the inference to be drawn from such fact is alone for the jury when weighed in connection with all the evidence adduced on the trial." *Williams v. State*, 60 Neb. 526.
2. **Criminal Law: CAUTIONARY INSTRUCTION.** Evidence *held* to be entirely circumstantial, and refusal to give cautionary instruction on subject of circumstantial evidence constituted error.

ERROR to the district court for Phelps county: J. W. JAMES, JUDGE. *Reversed.*

Harry H. Ellis and *Hoagland & Carr,* for plaintiff in error.

C. A. Sorensen, Attorney General, and *Clifford L. Rein, contra.*

Heard before GOSS, C. J., DEAN, GOOD, EBERLY, and DAY, JJ., and FITZGERALD, District Judge.

FITZGERALD, District Judge.

C. D. Ridenour was informed against in the district court for Phelps county on a charge of chicken stealing, and on trial to a jury was convicted and sentenced to serve six months in the penitentiary. The record is before us for review on defendant's claim of error in the rulings of the trial judge.

It appears from the bill of exceptions that the defendant is a married man with three sons under six years of age. He lives upon and operates a farm, owned by his father-in-law, P. G. Henderson. Mr. Henderson is also the owner of land occupied and farmed by Martin Francis and Charles Reed, the complaining witnesses in this case. Henderson lives with defendant and his family. Defendant's house is three and one-half miles north of Holdrege and the Francis and Reed house is four miles north and one mile west of Holdrege.

On May 4, 1929, defendant was working in the field, disking for corn, which job he finished about 6 o'clock, after which he went to the house and burned some straw on his potato patch. He ate his supper and went to Holdrege with some cream which he sold to the Lincoln Pure Butter Creamery. The manager of this creamery testifies that it was about 8:30 or 9 o'clock when defendant delivered the cream, and that defendant, on request of said witness, then went to the depot to get some cream for the witness that had come in on the "High Line." Defendant was then given a check for the cream which he had brought from his home, and defendant's testimony is that he then went out and purchased some groceries and started home.

He testifies that on his way home he came upon one R. W. Johnson, who stated that his car had broken down and he had some chickens in sacks that were getting warm and requested defendant to take the chickens to the David Cole Creamery at Holdrege. After some discussion defendant testifies that he consented to comply, and, while he was unloading the chickens at the Cole Creamery, Francis and Reed came upon the scene, and there is some dispute in the testimony as to whether anything was said at this time that would warn defendant that Francis and Reed claimed the chickens and that they were stolen from their farm.

There is probably sufficient evidence in the record, including discrepancies, which the jury might find in defendant's explanation of his possession of the chickens, to sustain a verdict, and we would be required to sustain the trial court's action in the case if there were no errors of law occurring in the trial and instructions of the court to the jury.

The rulings of the trial court on the admissibility of evidence are on the whole remarkably free from error, but as shown by the bill of exceptions the county attorney asked: "Were these the first chickens that you had sold since you lived here at your father-in-law's?" And the court, having a perfect right to assume that the prosecutor would follow up by showing previous acts of defendant tending to show intent, overruled objection and allowed witness to answer. However, the county attorney evidently had no such testimony but he continued this line of questioning with the manifest purpose of prejudicing defendant in the minds of the jury. Question No. 248, though not objected to, is of the same character. A series of questions, not objected to, as to the ownership of defendant's car being in his wife, has the suggestion of disparaging the defendant. Question No. 421, another effort along the same line, was ruled out by the court. Question No. 1018 is of the same character and received the same treatment by the court, but had, like the others, a tendency to prejudice defendant by the mere propounding of the question.

Instructions Nos. 1 and 2, tendered by defendant, we feel should have been given by the court to the jury, and likewise find that, in setting out as the statute applicable to the case that part of the statute including the provision in regard to receiving stolen chickens, was prejudicial to the defendant, inasmuch as he is conceded to be in possession of the chickens that were undeniably stolen. This court has laid down the rule that mere possession of stolen property gives rise to no presumption of guilt, and that the inference to be drawn therefrom is for the jury when considered with all the other evidence in the case. *Williams v. State,* 60 Neb. 526. The jury should have been warned that possession of the chickens was not sufficient in itself to convict. Instruction No. 1 submitted by defendant, and refused by the court, contained such warning; and instruction No. 5 given by the court is silent on this point, and is the only instruction given on this subject.

Instruction No. 2 tendered by defendant should also have been given, or some instruction in its stead. *Wakeley v. State,* 118 Neb. 346. There is no instruction in the record on the subject of circumstantial evidence, and we have here a case peculiarly confined to circumstantial evidence. The only evidence offered is the possession of the stolen chickens and statements by defendant in his explanation of such possession, which might cause the jury to disbelieve his whole explanation, and yet a careful study of all the evidence shows that all of defendant's statements could be true, and, if true, he is not guilty as charged. He is entitled to all the safeguards of the law in having his case submitted to a jury, and we feel that he has been deprived of this protection by the refusal of the two instructions offered by him.

Counsel for the state urge that this is not a case entirely resting on circumstantial evidence, for the reason that defendant might be charged with theft and convicted as charged, upon evidence proving that he was an accessory. This is true if the evidence proved complicity of defendant before the fact, but here the evidence proves either theft

by defendant or nothing, so far as the charge in the information defines a crime. Receiving stolen chickens or accessory after the fact are not charged in the information, and there can be no conviction under the information on evidence proving either of these offences.

We are of the opinion that the order of the trial court should be and it is hereby reversed and the cause is remanded to the district court for further proceedings.

REVERSED.

WILCOX & COMPANY, APPELLEE, V. HENRY DEINES, APPELLANT: BANK OF BAYARD, INTERVENER, ET AL., APPELLEES.

FILED MAY 2, 1930. No. 27150.

1. **Chattel Mortgages: VALIDITY.** Evidence examined and *held* to establish the true relation between the defendant Deines and the Bank of Bayard as that of landlord and tenant, and that the provision of the oral lease reserving the title of crops thereafter to be grown as security for an existing indebtedness was in the nature of a chattel mortgage and, under the facts in this case, void as to attaching creditors.
2. **Exemptions.** Whether property in the hands of a garnishee is exempt or not is to be determined as of the date of the service of the garnishee summons.

APPEAL from the district court for Morrill county: EDWARD F. CARTER, JUDGE. *Affirmed.*

T. F. Neighbors, for appellant.

Morrow & Morrow, contra.

Heard before GOSS, C. J., ROSE, DEAN, GOOD, THOMPSON, EBERLY and DAY, JJ.

EBERLY, J.

Plaintiff brought this suit in equity to reach certain funds held by the clerk of the district court for Morrill county as the property of Henry Deines for the Bank of Bayard "as their interests might appear, and to have said

funds paid by the clerk of said court to the plaintiff to apply on a judgment which plaintiff had obtained against the defendant Deines." There was a trial to the court, judgment for the plaintiff Wilcox & Company, and from which an appeal is prosecuted by the defendant Deines and the intervener, Bank of Bayard.

The parties in their briefs unite in stating the question presented to the court by the record as: "There is really only one question to be determined by this court: Whether the contract between E. R. Vanatta, in behalf of the bank, on the one hand, and Henry Deines, on the other, was in fact or in law a chattel mortgage, void as to creditors unless filed in the office of the county clerk of Morrill county." It appears that the following facts are agreed upon by all parties to the suit: That Henry Deines during the crop season of 1927 farmed the northeast quarter of section 26, township 21 north, range 51 west of the sixth P. M., in Morrill county, Nebraska, and planted 85 acres of the said land to sugar beets; that about March 1, 1927, the defendant Henry Deines was indebted to the Bank of Bayard in the sum of approximately $12,000; that the defendant E. R. Vanatta, who was the cashier of the Bank of Bayard, for and on behalf of said bank, personally entered into an oral contract with said Henry Deines, whereby it was verbally agreed that said Henry Deines would farm said described land owned by said Bank of Bayard during the crop season of 1927 and plant thereon 85 acres of beets, and that said Deines was to care for, cultivate and harvest said beets; that said Bank of Bayard at the time of entering into said contract was the owner of said premises and should retain the ownership of said beets grown on said land, and that E. R. Vanatta would officially enter into a contract with the Great Western Sugar Company for the growing and sale of said beets, and that said bank should advance sufficient money to cover the cost and expense of growing and cultivating said beets; that said bank should receive one-fifth of the growth of said crop, and that the balance of said crop was to be applied, first, on advance-

ments made by the bank to said Henry Deines in the growing and harvesting of said crops, and that the balance remaining from the proceeds of the crop, after deducting the expense and one-fifth of said beets, should be applied on the indebtedness of said Deines to said bank; and that E. R. Vanatta, for and on behalf of said bank, entered into a contract with the Great Western Sugar Company for the sale of all beets grown on said premises, and also entered into a labor contract for hand labor required to properly care for said beets while growing on said premises, and advanced the necessary expense for cultivating and harvesting said crop; that this was done, the advancements totaling $7,245.60; that the total proceeds from the sale of the beets grown on the farm for 1927 amounted in all to $10,163.12; payments were made by said Great Western Sugar Company each month for the beets delivered during the preceding month, and when said payments were received by the Bank of Bayard it placed to its credit one-fifth of said amount and credited the balance on the amount advanced to Deines for the growing of said crop and the balance remaining, if any, upon his indebtedness to said bank; that on or about the 8th day of November, 1927, an action was begun in the district court for Morrill county, Nebraska, by Diers Brothers & Company against Henry Deines, E. R. Vanatta, Great Western Sugar Company, et al., to reach the proceeds of the sale of said beets in satisfaction of a judgment which said Diers Brothers & Company had obtained against said Henry Deines in said case. Pursuant to a stipulation of the parties to that action the court released all sums of money then owing by said sugar company for beets delivered under this contract, except the sum of $2,000, and the excess over $2,000 was paid to the Bank of Bayard and Henry Deines, one-fifth of which was taken by the Bank of Bayard for the use of the land and the balance credited on the Deines indebtedness; that, of the $2,000 remaining in court, the court ordered that the sum of $418.75 be paid to the Bayard Motor Company in satisfaction of a lien which it claimed or had upon said

crop, and the sum of $1,116.46 be paid to Diers Brothers & Company in satisfaction of its judgment against Henry Deines, and the sum of $61.25 be paid on costs of that action, and the balance of $403.54, the amount involved in this action, was ordered paid to the defendant Henry Deines or the Bank of Bayard as their interests appeared. It is disclosed by the record that all sums advanced under this contract by the Bank of Bayard were upon promissory notes in writing, in usual form, executed by Henry Deines. The plaintiff and appellee in this case commenced an action in the county court of Morrill county against the defendant and appellant, Henry Deines, on the 8th day of November, 1927, and issued an order of attachment and garnishment against the Great Western Sugar Company. The order of attachment was levied on the silo of beets. The Great Western Sugar Company answered that it was not indebted to the defendant Henry Deines; and, thereafter, while the proceedings were still going on, Henry Deines hauled off the silo of beets that had been levied on under the attachment and sold the same to the Great Western Sugar Company, and it fairly appears from the record that the proceeds of the beets thus sold appear in the case before us. It appears in the evidence that defendant Deines had, prior to the commencement of these actions, treated the beets as his own property; that he had mortgaged the crop to the Bayard Motor Company, and that he had claimed to be the actual owner thereof to witnesses who testified in this case. The evidence on behalf of the bank of Bayard, in substance, admits that at least one of the purposes of the contract was to secure the indebtedness of Henry Deines to that institution which existed prior to March 1, 1927, the date upon which the verbal contract was made and entered into by Deines and the Bank of Bayard. The district court held that "said contract is in truth and in fact a chattel mortgage, (and, not being filed of record), that said contract was void as to purchasers in good faith and attaching creditors and was void as to the plaintiff herein, and that the plaintiff herein secured a lien on said

sum of money by reason of the attachment and garnishment proceedings issued out of the county court of Morrill county on the 8th day of November, 1927, and has now a valid and subsisting lien on said $403.54 for the payment of its said judgment obtained in the county court of Morrill county, Nebraska;" and an appropriate judgment was rendered consistent with the findings of fact thus made.

The case turns on whether the contract between the Bank of Bayard and Vanatta and Deines was a chattel mortgage and void as such as to the prevailing parties because not recorded prior to the attachment levy. Indeed, the matter to be determined is whether Deines is to be considered as a lessee or a cropper. This court is committed to the doctrine that a tenant is one who rents the land and pays for it either in money or part of the crops or an equivalent. A cropper farms the land and is paid for his labor or work in part of the crops. In one case the tenant pays for the use of the land with a part of the crops, in the other the crops belong to the owner of the land and he pays for the labor or cultivating with a part of the crop. It is to be remembered in the instant case that for all moneys advanced by the bank Deines gave his promissory notes. Deines also mortgaged the crop, and it is admitted that by the terms of the contract in question the debt of $12,000 owned by the bank and against Deines was to be secured by the crop of sugar beets thus raised. All these facts point to the conclusion that what was really in the mind of the parties was the creation of a security for the benefit of the bank, and this fact is at least partially admitted by Vanatta in his testimony given on the trial of the case; but it is to be observed that this agreement was made on the first day of March, 1927, and in the course of nature prior to the time of planting the crop. We are committed to the doctrine that a clause in a lease attempting to create a lien on future crops not then planted to be raised on leased premises is ineffectual to create either a legal or equitable lien on such crops. *Thostesen v. Doxsee,* 78 Neb. 40; *Brown v. Neilson,* 61 Neb. 765. And it further

appears that the attachment in the case was levied on beets prior to any change of actual possession as between Deines, the Bank of Bayard, or Vanatta.

It is quite plain that the principles announced in the case of *Skala v. Michael*, 109 Neb. 305, are wholly inapplicable to the situation presented by the present record. On the other hand, so far as the actual relation of the parties is concerned, there are no facts in the record which would justify or call for the application of the principles announced in *Robinson Seed Company v. Hamilton*, 87 Neb. 76, wherein the court held: "One who grows for and agrees to deliver a certain crop to the owner or possessor of real estate for an agreed price per hundred pounds, under a written contract by which it is expressly provided 'that nothing herein contained shall be construed to make the instrument a lease of the premises between the parties hereto, or divest the owner of his title to the crop,' is a mere cropper, and acquires no title to any portion of the crop, and cannot sell or mortgage the same or any part of it, without the consent of the owner." While the question presented by the record is one not without difficulty, considering all the facts set forth therein, we are constrained to the view that it establishes an oral lease between the representative of the Bank of Bayard and Deines; that the reservation of the title provided for was in truth and in fact intended for security only, and that the real relation of the parties was landlord and tenant, and that the rights of the attaching creditor under an attachment levied prior to the taking of actual possession by the lessor created a superior lien to the claims of the Bank of Bayard.

We have not overlooked the claim of appellant Deines that the money in suit is the proceeds of exempt property and therefore is not subject to attachment. It is to be remembered, however, that the amount here involved is but a portion of a sum of more than $10,000, and while it is true that, with the permission of the defendant Deines, that amount had been applied to various indebtedness, still

the facts fall within the doctrine announced in the case of *Kilpatrick-Koch Dry Goods Co. v. Callender*, 34 Neb. 727. The true rule is that whether property in the hands of a garnishee is exempt or not is to be determined as of the date of the garnishee summons. *Kilpatrick-Koch Dry Goods Co. v. Callender, supra.* As thus applied the claim of exemptions cannot be sustained.

It therefore follows that the district court in its determination of the case was right and its judgment in the premises is

AFFIRMED.

SKELLY OIL COMPANY, APPELLANT, V. DON GAUGENBAUGH, APPELLEE.

FILED MAY 2, 1930. No. 27350.

1. **Master and Servant:** WORKMEN'S COMPENSATION ACT: COMPENSABLE ACCIDENT. An injury arising solely as the result of an occupational disease is not compensable under the Nebraska workmen's compensation act; but, where the result is attributable in whole or in part to an accident, the fact that, but for the accident, the disease of which claimant suffered would be classed as occupational, will not prevent compensation, which in such case is awarded for the accident, and not the disease.
2. ———: ———: ———. It is sufficient to show that the injury and preexisting disease combined to produce disability, and not necessary to prove that the injury accelerated or aggravated the disease, in order to satisfy the requirement of the statute that the accident arose out of the employment.
3. ———: ———: ———: NOTICE. Evidence examined and *held* (a) that the employer had such "notice or knowledge of the injury" suffered by claimant as rendered the service of written notice as required by section 3056, Comp. St. 1922, unnecessary; (b) that the facts in the record disclose a case to which the provisions of the Nebraska workmen's compensation act are applicable; and (c) that the judgment of the trial court is sustained by the evidence.

APPEAL from the district court for Douglas county: ARTHUR C. THOMSEN, JUDGE. *Affirmed.*

Battelle, Morgan, Strehlow & Anderson, Cliff V. Peery and *C. L. Swim,* for appellant.

Dressler & Neely, contra.

Heard before GOSS, C. J., DEAN, GOOD, EBERLY and DAY, JJ., and FITZGERALD, District Judge.

EBERLY, J.

This action arises under the workmen's compensation law. Comp. St. 1922, secs. 3024 to 3084, inclusive, as amended. Appellee, Gaugenbaugh, was an employee of the Skelly Oil Company. He was hired in Omaha under a written contract of employment which was signed at the office of the Skelly Oil Company in that city. He selected as his territory the southwestern part of Iowa. He went out from Omaha to the territory during the week, returning on Saturday and Sunday, there attending meetings of instruction which were held under direction of the zone manager and for the promotion of the business in which he was engaged. A portion of his work, it appears, was actually performed in Omaha. He also did work in Nebraska for the company under this employment at Blair, Herman, Lincoln, and South Sioux City. His principal duties as a salesman, however, were transacted in Iowa, but the establishment maintained in the city of Omaha by the Skelly Oil Company constituted the base of operation, where its merchandise was stored, worked over, repaired, and shipped from, and through which the territory contiguous thereto, including plaintiff's Iowa territory, was actually served and supplied. In the course of this employment as a salesman at Harlan, Iowa, which was under the immediate direction and control of the company officials at Omaha, to whom the employee made daily reports, on the 20th day of May, 1929, while the employee, in the course of his duties, was lifting on a stove assisting in the installation of a skelgas outfit, he sustained an accidental injury, a strain, the result of which immediately appeared in the form of a hemorrhage in his right groin and leg. The employee upon the same day following was treated by an

osteopath in Harlan, Iowa, without affording any relief from the pain which he suffered, and thereupon returned to his Omaha home. The manager of the Skelly Oil Company business at that place, under whose directions he was working, had knowledge of this fact and of the cause thereof contemporaneous with his arrival at Omaha, and thereafter visited this employee in the hospitals from time to time during a long and dangerous illness following this accident. Expert physicians employed by defendant examined plaintiff and reported his condition to the employer.

To defeat the claim for compensation it was alleged in the district court that the disabilities of appellee were not caused nor contributed to by any accident, but were due wholly to purpura which was in truth an occupational disease; second, that no notice either oral or written of injury was given as prescribed by section 3056, Comp. St. 1922.

First, it is the theory of the defendant oil company that plaintiff's condition is due to purpura and in no manner due to his duties as an employee of the oil company. On the other hand, the employee's contention is that the inception of the condition was due to inhalations by the employee of skelgas during the course of his employment; that this was induced by the representations of the oil company to its agents and its patrons that the product was wholly harmless and contained no poisonous substances whatsoever and could be safely inhaled; that, relying thereon, as part of the demonstrations made by plaintiff as salesman for the defendant oil company, he from time to time, believing the representations made to be true and that skelgas was in truth and in fact wholly harmless, inhaled the same; that, as a result of the inhalations thus made, the poisonous effects of the gas produced an "unexpected and unforeseen event happening suddenly and violently, with or without human fault, and producing * * * objective symptoms of an injury" (Comp. St. 1922, sec. 3075) by causing a state of purpura to exist in plaintiff's circulatory system, and due to the condition thus created

the effect of the accidental strain suffered by the plaintiff on the 20th day of May, 1929, was to "light up," aggravate and accelerate the results of the previous accident, and to cause the serious condition which undoubtedly existed after his return to Omaha and his reception into the hospitals of that place. As this is a trial *de novo*, it may be said that it appears undisputed that the employee, plaintiff herein, in the course of his employment by the defendant, suffered from mercurial poisoning in February, 1929; that he was then examined by an eminent physician employed by the oil company whom the latter called as a witness in the present case. From the testimony of this physician it appears without question that in February, 1929, he examined the plaintiff, employee, and at that time there was no indication that employee was then suffering from purpura. From this and other testimony in the record we are constrained to find, as a matter of fact, that the condition of purpura which prevailed at the time of plaintiff's injury hereinafter referred to was a development of a date later than February, 1929. The testimony of the oil company's experts was restricted to the subject of the elements which together constituted skelgas. Of course, their testimony did not relate to the skelgas that had been actually inhaled by the employee. The testimony of the experts on behalf of the employee was as to the effect of the deleterious character of skelgas when applied to animal life, but that furnished no evidence as to the nature of the elements constituting the same. However, we find it unnecessary to determine whether skelgas was the active agent, the deleterious effects of which contributed to the condition of purpura which prevailed in the employee's body at the time of the accident on the 20th day of May, 1929, for we are convinced from a consideration of all of the evidence that on this date the plaintiff sustained a strain which was the immediate and the proximate cause of plaintiff's condition. If this be true, then we must accept as a fact that, notwithstanding the prior existence of purpura and the fact that it contributed to plaintiff's con-

dition at the time of the accident, the actual strain itself and its effects in "lighting up" and aggravating the condition which then prevailed constitutes a proximate cause, and that the plaintiff's condition as it existed after the accident and, as well, as it now appears is therefore the direct result of an injury arising out of and in the course of his employment. But under the facts in this case it is found unnecessary to determine whether the condition of purpura with which the plaintiff was afflicted was the result of accident or was to be classed as an occupational disease. Assuming, but not determining, that purpura from which plaintiff was suffering was properly classified as an occupational disease, to sustain a recovery it was sufficient to show that the injury, the strain, suffered and this pre-existing condition combined to produce the disability, and it was not necessary to prove that the injury, the strain, either "lighted up," accelerated, or aggravated the purpura to satisfy the requirement that accident arose out of the employment. The rule is: "Death or injury arising solely as the result of an occupational disease is not compensable under the workmen's compensation act; but, where the result is attributable in whole or in part to an accident, the fact that, but for the accident, the disease of which claimant died would be classed as occupational, will not prevent compensation, which in such case is awarded for the accident, not the disease." *Van Vleet v. Public Service Co.*, 111 Neb. 51. In other words: "It is sufficient to show that the injury and pre-existing disease combined to produce disability, and not necessary to prove that the injury accelerated or aggravated the disease, in order to satisfy the requirement that the accident arise out of the employment." *Gilcrest Lumber Co. v. Rengler*, 109 Neb. 246. This being true, the employee is entitled to compensation at the rate allowed by the district court, unless, because of lack of notice and failure to comply with the statute in this respect, his rights have been lost, and to that subject we will now address ourselves.

The appellant here has cited a large number of English

cases to the point that delay in giving notice, after the seriousness of the injury has become apparent, will generally be held to prejudice the employer in his defense. Section 3056, Comp. St. 1922, is the authoritative statute on this subject. This section contains the provision: "Want of such written notice shall not be a bar to proceedings under this act, if it be shown that the employer had notice or knowledge of the injury." A comparison of section 7 of the "Employer's Liability Act, 1880," volume VIII, Chitty's English St. (6th ed.) p. 777, which is the corresponding provision of the English act on this subject with the provision of section 3056, Comp. St. 1922, will disclose that, not only is there a material difference in the sections, but the provision last above quoted is not incorporated in the English act. Indeed, the difference is such as renders inapplicable the conclusions which might otherwise be drawn from the English cases cited by the appellant in his brief. It is quite apparent from the evidence that the employer's manager at Omaha was not only early advised of plaintiff's serious condition, but had actual knowledge of the facts and circumstances which actually caused the same, and thus clearly brings the case within the provision last above quoted which in effect renders a written notice unnecessary where the employer had actual notice or knowledge of the injury. We conclude therefore that the failure to give notice in this case, in view of the circumstances disclosed in the evidence, does not afford the employer any defense in this action.

The employer also contends that employee in this case was not under the terms of the Nebraska compensation act. In view of the record as an entirety there can be no question upon this point. It plainly appears that the work of the employee in this case was an incident to an industry which was substantially carried on at Omaha, Nebraska. At that point was created what might be termed a base for operations and constituted in truth and in fact an essential industry as contemplated by our compensation statute. *Bradtmiller v. Liquid Carbonic Co.*, 173 Minn. 481.

Both parties appealed from the action of the trial court in the allowance of a $300 attorney's fee. It will be observed that these services were performed in the presence of the trial court and no evidence as to their value was offered below. We have only the record as shown in the bill of exceptions, and from it appears no expert evidence produced in that tribunal relating to the value of the services performed. In the case of *Davis v. Lincoln County*, 117 Neb. 148, there was evidence in the record which was directed to the value of the attorney's services, and in that case we sustained the action of the trial court in an allowance based upon the record. In view of the absence of this class of evidence in the present record, we do not see our way clear to increase the fee allowed for services in the district court, but the allowance there made is approved. For services in this court, however, the majority of the court deem that $200 is a reasonable fee, and said amount is fixed and required to be paid the employee's attorney, thus making the total attorney's fees in the district court and supreme court $500. The allowance by the district court of the doctors' bills, hospital, and nursing bills, on account of said accidental injury, of $1,438.50 is approved, and the credits allowed the employer by the district court in the sum of $600 is also approved. The finding and decree of the district court in all respects is adopted as and for the judgment of this court, and in addition the employer will pay the sum of $200 attorney's fees in this court and the costs of appeal.

AFFIRMED.

STATE, EX REL. BEN ALLEN, APPELLANT, V. CARL RYDER, SHERIFF, ET AL., APPELLEES.

FILED MAY 2, 1930. No. 27073.

Criminal Law: SENTENCE. When sentence is pronounced upon one already serving a sentence from another court, the second sentence does not begin to run until the sentence which the prisoner is serving has expired, unless the court pronouncing the second sentence specifically states otherwise.

APPEAL from the district court for Otoe county: JAMES T. BEGLEY, JUDGE. *Affirmed.*

Andrew P. Moran, for appellant.

George H. Heinke, contra.

Heard before GOSS, C. J., DEAN, THOMPSON, EBERLY and DAY, JJ., and FITZGERALD and L. S. HASTINGS, District Judges.

FITZGERALD, District Judge.

This matter comes here on an appeal from an order of the district court for Otoe county denying an application for a writ of habeas corpus presented by Ben Allen, appellant herein.

The facts disclose that appellant was convicted by a jury in the district court for Otoe county, on an appeal from a conviction in the county court of Otoe county, and the penalty fixed therein.

From the conviction in the district court for said county and the penalty of 30 days in the county jail of said county, defendant Allen appealed his case to this court, March 30, 1929, the order of the district court was affirmed, and mandate issued to the district court for Otoe county commanding it to execute its order previously entered. Whereupon the district court issued a commitment to the sheriff of said county to take possession of said Ben Allen and confine him in the county jail for a period of 30 days.

In the meantime, however, and on March 26, 1929, Ben Allen had pleaded guilty in the county court of said county to another offense similar to the one from which he had appealed, and as a penalty had been sentenced to serve 45 days in the county jail, wherein he was confined at the time the mandate was received by the district court and at the time the commitment issued by virtue thereof.

Appellant contends that he began to serve the 30 day sentence on April 5, 1929, while appellees contend that his service did not begin until the end of the 45 day sentence.

If the two sentences were pronounced by the same court

at the same term, there might be some consideration given the contention of appellant, but, since he was confined in the county jail on a commitment from another court at the time he was brought before the district court for sentence in accordance with the mandate from this court, he was not free to begin service on the district court commitment until the expiration of the county court term. It was not his right to be brought from the county jail to appear before the district court for sentence, and the fact that, as a matter of sufferance, he was allowed to appear cannot be taken advantage of by him in this proceeding. He brought on the sentence in the district court at the time it was pronounced, by his motion, and there is nothing in the record to indicate that the district judge knew he was not free to begin his sentence. If the district judge knew appellant was serving a sentence, he could have made the sentence fit those circumstances. It appears, however, that there might have been a withholding of the facts from the district court for the purpose of defeating its order.

We cannot lay down a rule that sentences pronounced in different courts run concurrently, even though they are both to be served in the same institution, when the sentence pronounced is silent on the matter.

We are of the opinion that the application for the writ of habeas corpus was properly denied, and that the order of the district court for Otoe county should be, and it is,

AFFIRMED.

AUGUSTUS W. DUNBIER, APPELLEE, V. CARL MENGEDOHT ET AL., APPELLANTS.

FILED MAY 2, 1930. No. 27109.

1. **Divorce: DECREE: ESTOPPEL: ALIENATION OF AFFECTIONS.** In an action by a husband against third parties for the alienation of his wife's affections, a decree of divorce, granted his wife on the ground of extreme cruelty, is not an adjudication or an estoppel by judgment against the husband in favor of such third

parties, so as to operate as a bar to his cause of action, although such decree is competent as evidence for other purposes pursuant to the provisions of section 1 (8837), ch. 75, Laws 1925.

2. **Husband and Wife:** ALIENATION OF AFFECTIONS. A husband may maintain an action for the alienation of his wife's affections where the defendant's conduct was the controlling cause of the wife's estrangement, although his own misconduct and other causes may have contributed thereto.
3. **Contract:** RIGHT OF RECOVERY. "When plaintiff can maintain his cause of action without the aid of an illegal act or one that might be construed as *contra bonos mores* he will be allowed to recover." *In re Estate of Lowe*, 104 Neb. 147.
4. **Husband and Wife:** ALIENATION OF AFFECTIONS: INSTRUCTIONS. Where there is evidence that plaintiff participated in certain illegal and immoral transactions not necessary to prove any part of his case, it was not error to refuse to instruct the jury to return a verdict in favor of defendants on account thereof.
5. ———: ———: DAMAGE. In an action where two or more persons are alleged to have formed a conspiracy to wrongfully alienate the affections of plaintiff's wife, cause their separation and divorce, and that, in pursuance of such conspiracy, each did certain acts and by reason thereof did alienate the affections of plaintiff's wife, cause their separation and her divorce from him, the damage done and not the wrongful confederation is the gist of the action.
6. **Conspiracy:** SEVERAL JUDGMENTS. "Where several defendants are proceeded against as conspirators in the commission of a tort, which would be actionable if committed by one alone, a judgment against one or more of such defendants may be sustained without proof of a conspiracy among all of them." *Harvey v. Harvey*, 75 Neb. 557.
7. **Instructions** complained of examined and *held* that the giving of such instructions was not error.
8. **Appeal:** EVIDENCE: RULINGS: REVIEW. "The rulings on the admission of testimony cannot be reviewed unless the same were either by general or specific assignments called to the attention of the trial court by the motion for a new trial." *Flower v. Nichols*, 55 Neb. 314.
9. **Evidence** examined and held *sufficient* to sustain the verdict of the jury.

APPEAL from the district court for Douglas county: HERBERT RHOADES, JUDGE. *Affirmed.*

Morsman & Maxwell and *John A. McKenzie*, for appellants.

Lovely & Lovely and *O'Sullivan & Southard, contra.*

Heard before GOSS, C. J., DEAN, GOOD, THOMPSON and EBERLY, JJ., and FITZGERALD and WILLIAM G. HASTINGS, District Judges.

HASTINGS, District Judge.

This action was commenced in the district court for Douglas county, by Augustus W. Dunbier, as plaintiff against Carl Mengedoht, William Mengedoht, Bertha Mengedoht, Max Rapp, and Elsie Rapp, as defendants, to recover damages for the alleged intentional and malicious alienation of the affections of his wife, Augusta A. Dunbier. The defendants, appellants, are the two brothers, stepmother, brother-in-law, and sister of the wife of plaintiff, appellee. Trial was had to a jury and a verdict returned against all of the defendants, assessing plaintiff's damages at $5,000. Judgment was entered on the verdict.

The defendant Bertha Mengedoht filed a separate motion for a new trial and the other defendants joined in a separate motion; both motions were overruled. The defendant Bertha Mengedoht has appealed separately and files a separate brief containing separate assignments of error; the other defendants jointly appeal.

The petition in substance alleges that the plaintiff and Augusta A. Dunbier were married on October 12, 1917; that plaintiff at the time of his marriage was a painter of portraits and landscapes; that after his marriage he continued his career as such painter; that sometime prior to January 31, 1924, while plaintiff was living happily and contentedly with his wife at the home of his wife's parents and enjoying her love and affection, the defendants conspired and confederated together with the wicked, malicious and wrongful purpose of interfering with the marriage relation existing between plaintiff and his wife and alienating her affections; that the defendants and each of them,

in furtherance of such conspiracy, by means of the acts alleged therein, alienated the affections of plaintiff's wife from him, caused her to separate from and leave plaintiff on the 29th day of January, 1926, and to go to Seattle where the defendant Carl Mengedoht was living, and induced her to file suit for a divorce on the 24th day of May, 1926, and to obtain a decree of divorce from plaintiff on the 11th day of January, 1927.

Defendants by their separate answers allege, as one of their defenses, that on the 24th day of May, 1926, plaintiff's wife brought an action against him for a divorce, and on the 11th day of January, 1927, she was granted a decree of divorce on the ground of extreme cruelty; that said decree is final and was and is a complete defense and bar to plaintiff's cause of action. The right of plaintiff's wife to a divorce was contested by plaintiff. On the trial defendants introduced the divorce decree in evidence. It is contended by counsel for defendants that the decree of divorce is an adjudication between Dunbier and his wife, to the effect that Dunbier's wrongful acts, his cruel treatment of his wife, caused the loss of the love and affection of his wife for him and all rights of the consortium of his wife. In other words, that the decree of divorce obtained against plaintiff by his wife is a complete bar to plaintiff's cause of action against third parties for alienating her affections. The contention is based upon the provisions of section 8837, Comp. St. 1922, as amended by chapter 75, Laws 1925. The amendment was made by adding the following to said section:

"Provided, however, the wife shall be a competent witness against the husband in all prosecutions arising under section 9584, Compiled Statutes of Nebraska for 1922; and either of them may be a witness against the other in any action brought by either husband or wife against a third person, relating to the marriage relationship between such husband and wife, or the interruption of such relationship; and any decree of divorce by one against the other shall be competent as evidence in any action by one of them

against a third person relating to such marriage relation or to the interruption thereof or interference therewith."

A determination of the question involved depends upon the meaning to be given to the phrase, "any decree of divorce by one against the other shall be competent as evidence." Unless the rule has been changed by the statute under consideration, the authorities are practically unanimous in holding that a decree of divorce is not a bar to an action by the husband against a third person for the prior alienation of his wife's affections, though the divorce be granted to the wife for the misconduct of the husband; the decree not being *res judicata* with respect to the husband's cause of action and not operating as an estoppel by judgment. 9 R. C. L. 496, sec. 317; 13 R. C. L. 1468, sec. 518; note, 20 A. L. R. 943.

The decree in a divorce action is only a judgment *in rem* so far as it effects the status of the parties, and thus far is an adjudication as against the world. As a judgment *in rem* it is admissible in evidence in this kind of an action to establish the prior existence of the marriage and its dissolution; in all other respects the judgment is *in personam* and binds only the parties thereto. A judgment *in personam* is not an adjudication or an estoppel by judgment in favor of strangers. We have held:

"A judgment record cannot be used in favor of a stranger to establish facts recited in the judgment unless such finding is based on an admission made by the party against whom it is sought to be used." *Sickler v. Mannix,* 68 Neb. 21.

And in *Hope v. Twarling,* 111 Neb. 793 it is said: "A prior decree of divorce may be admitted in evidence to prove marriage and the severing of conjugal relations, but it is not a former adjudication with respect to the subsequent cause of action and does not operate as an estoppel by judgment."

That case was decided about a year before the statute was amended. The rule announced is in accord with the great weight of authority and is supported by reason. An

action for divorce and one for alienation of affections are not the same, nor are they between the same parties. In this case plaintiff's cause of action arose before the commencement of the divorce action. The acts of the defendants complained of could not have been set up as a defense in the divorce action. Plaintiff may have been guilty of extreme cruelty and still the acts of the defendants the controlling cause of the alienation of his wife's affections and their separation. The wife may have had grounds for a divorce and not elected to avail herself thereof, but for the alleged acts of the defendants. The general rule is:

"On the other hand, a husband may maintain an action for the alienation of his wife's affections where the defendant's conduct was the controlling cause which led to the wife's estrangement, although other causes may have contributed thereto. Hence, where cruelty or other misconduct on the part of the husband is only a subsidiary cause of the alienation he is not thereby barred from recovery." 13 R. C. L. 1464, sec. 513. See 30 C. J. 1124, 1125, secs. 981, 982.

The statute does not provide for what purpose the decree shall be "competent as evidence." The statute does not provide that the decree shall be competent as evidence against a plaintiff in this kind of an action and in favor of a third party so as to operate as a bar to his cause of action against such third party. If the legislature had intended it to accomplish that particular end it would have been a very simple matter for it to have employed appropriate language with which to express such intention. To hold that the legislature intended the decree to operate as a bar would be to read an element into the statute that is not there. It will not be presumed, from the language used, that the legislature intended to set aside well-established rules of law. We hold that the decree was not competent as evidence in an action of this kind in favor of a third party, a stranger thereto, to prove an adjudication or an estoppel by judgment, except so far as it oper-

ated as a judgment *in rem,* and that it did not operate as a bar to plaintiff's cause of action. The decree was admitted in evidence, and the defendants had the full benefit of the findings therein against the plaintiff without any limitation placed on the consideration thereof by the trial court, except the refusal to instruct the jury that such decree, as a matter of law, was a bar to plaintiff's action. In such refusal error was not committed.

The defendants, other than Bertha Mengedoht, assign as error the refusal of the trial court to direct a verdict in their favor on the ground that plaintiff's cause of action is, in part, based upon an illegal and immoral transaction. The question raised by these defendants is not assigned as error, nor is it discussed in the brief of the defendant Bertha Mengedoht. The illegal and immoral transactions upon which error is predicated are: That plaintiff participated in two illegal abortions committed upon his wife, the first in April, 1918, and the second in March, 1919. It appears from the testimony of plaintiff that, with the consent of his wife and at the insistence of the defendant Bertha Mengedoht, he participated in two illegal abortions performed upon his wife by a doctor in the city of Omaha. The rule of law is well settled that no court will lend its aid to a litigant who founds his cause of action upon an immoral or illegal act, and if it was necessary for plaintiff to prove said abortions in order to establish his case, either in whole or in part, then he cannot recover. Where, however, he can maintain his cause of action without the aid of an illegal or immoral act he is entitled to recover. This is the general rule and the rule announced by this court in the case of *In re Estate of Lowe,* 104 Neb. 147. The general rule is well stated in the case of *Frost v. Plumb,* 40 Conn. 111, where that court said:

"We understand the rule to be this: The plaintiff cannot recover whenever it is necessary for him to prove, as a part of his cause of action, his own illegal contract, or other illegal transactions; but if he can show a complete cause of action without being obliged to prove his own

illegal act, although such illegal act may incidentially appear, and may be important even as explanatory of other facts in the case, he may recover. It is sufficient if his cause of action is not essentially founded upon something which is illegal."

It is claimed by counsel for defendants that the petition alleges said acts of abortion as part of the acts upon which plaintiff bases his claim and call attention particularly, in connection therewith, to paragraph 8 of the petition. A careful examination discloses no such allegations. The illegal acts complained of took place long before there is any evidence that there was any concerted or individual action on the part of the defendants to alienate the affections of plaintiff's wife. In fact, up to the time just before the death of the father of plaintiff's wife, in January, 1924, there is no evidence that would indicate that the defendants, either individually or collectively, had done anything that could be construed as a design or purpose to alienate the affections of plaintiff's wife and cause her separation from him. Proof of the acts of abortion performed upon plaintiff's wife were not necessary nor proper to prove any part of his case. Therefore, it was not error to refuse to instruct the jury to return a verdict in favor of the defendants on account thereof.

The giving of instruction No. 4 is assigned as error by the defendant Bertha Mengedoht. The trial court, after correctly instructing the jury upon the law of conspiracy, gave instruction No. 4, to the effect that the failure to establish a conspiracy would not defeat plaintiff's right of action nor his right to recover, but that the action might proceed for the recovery of damages against such of the defendants, if any, as were shown to be guilty of the wrongful acts complained of. The instruction correctly states the law. The rule in this state is:

"In an action for a conspiracy, the damage, and not the wrongful confederation, is the gist of the action." *Commercial Union Assurance Co. v. Shoemaker*, 63 Neb. 173.

And in *Harvey v. Harvey*, 75 Neb. 557, it is said:

"Where several defendants are proceeded against as conspirators in the commission of a tort, which would be actionable if committed by one alone, a judgment against one or more of such defendants may be sustained without proof of a conspiracy among all of them." Also, see *Booker v. Puyear,* 27 Neb. 346; 5 R. C. L. 1190, sec. 41; 2 R. C. L. Perm. Supp. 1586, sec. 41, par. 16; 12 C. J. 646, sec. 257; *Jones v. Monson,* 137 Wis. 478; *Ratcliffe v. Walker,* 117 Va. 569.

The tort alleged in the petition would be actionable if committed by one of the defendants alone, and the allegations of the petition are sufficient to sustain a judgment against one or more of the defendants participating in the wrongs complained of, without proof of a conspiracy. Counsel for defendants cite *Reid v. Brechet,* 117 Neb. 411, as authority in favor of their contention. The case does not support the contention made, nor is it in conflict with the authorities cited.

The defendant Bertha Mengedoht claims that error was committed in permitting the plaintiff, over objections of the defendants, to testify that just prior to his marriage plaintiff conferred with the defendants about his marriage and told them, in substance and effect, that he had no money, that he was an artist, that he would not earn any great amount of money for a number of years, and that he could not be expected to earn any money until he had pursued his art studies for a number of years; that all the defendants then said, "That's all right, go ahead and get married," and, when the question arose how the new bride and groom were to live, that Bertha Mengedoht said, "Stay right here." It is also claimed by all of the defendants that the giving of instruction No. 11, limiting the purpose for which that evidence might be considered, was error. In that instruction the jury were instructed in effect that such evidence was admitted for the sole purpose that it might tend to show good faith or lack of good faith of the defendants in giving advice or counsel to plaintiff's wife after her marriage to plaintiff, and that if they found that any such conversation took place, as related by plaintiff, they

would give such testimony such weight as they believed it entitled to as bearing solely upon the question of good faith or the lack thereof; and if they did not believe that such conversation or conversations took place or that, if they did, that same had no evidential value on that question, they should entirely disregard any and all of such conversations testified to by plaintiff. Where evidence is admissible for a certain purpose, it is proper for the trial court, by instruction, to limit it to the purpose for which it was admissible. *Salistean v. State,* 115 Neb. 838. The giving of the instruction was entirely proper and it would seem to be very favorable to the defendants. It was entirely proper to show the situation of the parties immediately before and at the time of the marriage; the feelings of the plaintiff and the defendants toward one another at that time; that plaintiff explained his situation fully, financially and as an artist; that defendants, knowing the same, were satisfied to have the marriage take place. The evidence tended to show that the defendants were not opposing the marriage, either on financial grounds or otherwise. We are unable to discover anything in the evidence complained of, or the giving of instruction No. 11, that was in any way prejudicial to the defendants.

The defendants, other than the defendant Bertha Mengedoht, in their brief discuss claimed errors occasioned by the admission of certain evidence and which are not discussed in the brief of the defendant Bertha Mengedoht. An examination of the record discloses that the rulings on the admission of the evidence complained of was not called to the attention of the trial court in the separate motion for a new trial filed by said defendants, either by general or specific assignments therein. The motion for a new trial does not even contain the usual assignment of "errors of law occurring at the trial." The record being in that condition, the rulings on the admission of the evidence complained of cannot be reviewed. *Flower v. Nichols,* 55 Neb. 314; *First Nat. Bank v. Hedgecock,* 87 Neb. 220; *Waxham v. Fink,* 86 Neb. 180.

It is insisted by all the defendants that the evidence is not sufficient to support the verdict. It is not practical to even outline the evidence. The evidence is contained in three volumes of over 1,400 pages. We have read the evidence and given it careful consideration. The evidence is in hopeless conflict. The evidence on behalf of the plaintiff seems to sustain all of the essential allegations of his petition, while the evidence on behalf of the defendants put in issue the truth of such evidence on behalf of plaintiff. The matters in issue were peculiarly within the province of the jury to determine. If the testimony of plaintiff and his witnesses were believed, then a verdict for plaintiff was proper; otherwise, if defendants and their witnesses were believed. The credit to be given to the several witnesses and the weight to be given to their testimony were matters entirely for the determination of the jury. The jury had the advantage of the opportunity to see and note the conduct and demeanor of the several witnesses while testifying, their apparent bias or want of bias, and it may be that the conduct and demeanor of the several witnesses while testifying prompted the jury to return the verdict they did. The testimony of one truthful witness may outweigh the testimony of many others whose appearance and testimony do not carry with it a conviction that it is true.

It appears from the statements in the briefs that this case has been submitted to two juries and both juries, on the evidence found for the plaintiff. This is entitled to some consideration. From a consideration of all the evidence, we hold that it is sufficient to sustain the verdict. From the record before us it appears that the case was fairly tried and properly submitted to the jury for their determination. We have given all the questions properly raised and discussed in the briefs by defendants careful consideration and find no prejudicial error. It follows, from what has been said heretofore, that the judgment of the district court should be and is hereby

AFFIRMED.

MILES N. LEE, APPELLANT, V. CHARLES P. HILDEBRAND, APPELLEE.

FILED MAY 2, 1930. No. 27079.

1. **Notes:** ACCOMMODATION MAKER. One to be an accommodation maker of a promissory note must not receive any benefit or consideration directly or indirectly by way of the transaction of which the note was a part, and the transaction must be one primarily for the benefit of the payee.
2. **Parol Evidence:** NOTE: CONSIDERATION. Parol evidence is admissible to prove that the note was given without consideration as accommodation paper and for a special purpose.
3. **Notes:** ACCOMMODATION PAPER. Accommodation paper executed for a specific purpose cannot be enforced against the accommodation maker by a holder who took it, knowing it was being used for an entirely different purpose than that for which it was executed.
4. **Trial:** DIRECTION OF VERDICT. It is not error for the trial court to direct a verdict where the questions developed at the trial are purely questions of law and where the evidence will not support a conflict upon questions of fact for the jury to determine.

APPEAL from the district court for York county: HARRY D. LANDIS, JUDGE. *Affirmed.*

Miles N. Lee, Sullivan & Wilson and *George W. France*, for appellant.

W. L. Kirkpatrick and *Good, Kirkpatrick & Dougherty, contra.*

Heard before GOSS, C. J., ROSE, DEAN, GOOD, EBERLY and DAY, JJ., and MESSMORE, District Judge.

MESSMORE, District Judge.

This action was brought by appellant in the district court for York county to recover on a promissory note. His petition was in the usual form and prayed judgment against appellee for $2,427.24, with interest thereon at 10 per cent. from August 21, 1925.

Appellee's answer admitted the giving and delivery of the note, alleged the same was given without consideration and that he received no value therefor; further, the note

never was a valid and enforceable asset of the Farmers State Bank of Erickson and appellant was not the holder thereof in due course; that in the autumn of 1920 the bank owned and carried among its current assets two notes made by R. E. Coe and Harry L. Patchen in the aggregate of about $2,000, secured by a chattel mortgage upon certain pop-corn; that Coe and Patchen delivered said corn to the bank in good condition in the fall and winter of 1920 and 1921, and said corn was of the reasonable market value of approximately $3,000; that said corn was kept by the bank until it was finally disposed of; that in November, 1921, the corn still remained in the possession and control of the bank, which still had among its assets the notes of Coe and Patchen which were overdue and unpaid; that the bank, desiring to close out its transactions with these men, agreed with them whereby the bank was to surrender to them their notes and they were to deliver and turn over to the bank said corn as its own property; further, the bank, being desirous of replacing and substituting in its current assets other paper in an amount equal to the Coe and Patchen notes and accumulated interest, persuaded appellee to give his original note, at that time representing to him that his note was merely a funding of values, that he would never have to pay the note, and the bank would in a short time sell said corn and retire his note from the proceeds of the sale thereof; that appellee had never seen said corn, and the bank represented to him, on the giving of each renewal note, that the corn was ample in quality, quantity and condition to satisfy the renewal notes appellee made from time to time, and that he relied on the representations so made to him; that the bank never made a demand on him for the payment of the original note nor any of the renewals thereof; that the security therefor was liquidated by the bank, the corn having been fed to swine, the swine sold, and the proceeds from the sale thereof in the sum of $655.27 indorsed on said note, all of which was without appellee's knowledge; that the guaranty fund commission of Nebraska took charge and control of said bank in January, 1926, and

made no demand on appellee for the payment of the note in question.

Appellant's reply admitted that appellee made, executed and delivered to said bank his promissory note on or about November 21, 1921; admitted that R. E. Coe and Harry L. Patchen were indebted to the bank, as set forth in appellee's answer, and that they transferred their title and interest in said corn to the bank; that appellee executed and delivered his note to the bank in an amount equal to the principal and interest of the notes of Coe and Patchen; admitted that the bank fed said corn to swine, sold the same, and the proceeds from the sale thereof in the sum of $655.27 were credited on appellee's note. Appellant denied each and every allegation of fact in appellee's answer; denied the existence of the alleged agreement; plead the illegality thereof and an estoppel to assert the same, if made; denied appellee was an accommodation maker and that the note was given for a funding of values; set out the renewals of the original note made by appellee, the appointment of a receiver for the bank, and the sale of appellee's note to appellant by said receiver, and that said note was carried as an asset of the bank.

On the trial of the action, at the close thereof, the trial judge directed a verdict for appellee, from which ruling appellant appeals.

The evidence adduced at the trial shows the note sued upon to be a fifth renewal of the original note given by appellee to said bank and differs therefrom only as to the amount and date; that the president of the bank, Mr. Doran, obtained from appellee, his son-in-law, the original note on November 21, 1921, and at that time had a conversation with appellee as follows: "The conversation was this, that the Farmers State Bank at that time owned 1,500 bushels of pop-corn that they couldn't carry in the pouches of the bank, and he said that the price of pop-corn at that particular time wasn't very good, and they were holding the pop-corn for a higher market, and he asked me if I would sign my note for this amount that the bank had in the pop-

corn at that time, with the understanding that they would sell the pop-corn and cancel the note; and that's what I did."

It appears that Coe and Patchen each owed the bank on their separate notes, and the collateral for said notes was certain pop-corn; that the bank was examined on August 14, 1921, and a recommendation made that the Coe and Patchen notes must be liquidated; Coe and Patchen each later signed a waiver, assigning their title and interest in said corn to the bank; said notes were carried as assets of the bank on December 7, 1921, when the bank was examined, and on February 4, 1922, the Coe and Patchen notes were charged off the books as assets of the bank and appellee's note went into the bank at that time in the exact amount of the Coe and Patchen notes, with interest added.

Mr. Boyle, cashier of the bank, testified that Mr. Doran brought appellee's note with him when he came up on one of his trips to Erickson and said we could place it in the assets of the bank for this corn that we have taken over from these parties. He further testified he knew the note was given by appellee for the accommodation of the bank, and Mr. Doran said he preferred putting in the note for the corn rather than carrying it as an item of property the same as they carried real estate on the bank's books.

Mr. Jones, who succeeded Boyle as cashier of the bank, testified that appellee's note was carried as an asset of the bank.

There is evidence to the effect that the corn in question was fed to swine owned by the bank, the swine sold, and the proceeds from the sale thereof in the sum of $655.27 were indorsed on appellee's note. Appellee denied knowledge of this fact.

Witness P. D. Marshall, chief of the bureau of banking of the department of trade and commerce, whose deposition was read in evidence, testified that he examined the bank on May 4, 1925, and reported as follows: "C. P. Hildebrand $2,806.07. Accommodation note. Represents chattels, mostly corn, now being fed to hogs. Equity over expense

about $500. Balance $2,306.07 loss." He examined the bank again on January 6, 1926, and reported as follows: "C. P. Hildebrand, York, Druggist, $2,151.70. Accommodation note given for chattels, now sold." Again, on January 25, 1926, in an inventory filed by this witness with the banking department he reported as follows: "Number 6789, 7-22-24, C. P. Hildebrand $2,151.70. Accommodation note for bank." Mr. Marshall further testified that he received this information from the officers of the bank.

On February 1, 1927, a receiver was appointed for the bank and on August 7, 1928, appellant purchased appellee's note and other notes, mortgages, etc., of the bank at a judicial sale, said note at that time being more than one year past due.

The evidence further shows that appellant had a conversation with appellee to the effect that appellee's note went into the bank in place of the Coe and Patchen notes and to take up the same because the banking department objected to said notes. This conversation is denied by appellee.

It was further shown as to the condition of the bank and its indebtedness to a bank in York, Nebraska, of which Mr. Doran was president and the appellee a director. Appellant contends that appellee knew of the condition of the bank, that he was a stockholder therein and paid a stock assessment in 1923, that he was a director in the bank at York and knew the Erickson bank owed the York bank considerable money; that he was related to Mr. Doran, president of the Erickson bank, as son-in-law; that he received a consideration for the giving of his original note in that the bank was kept open and he escaped an assessment upon his stock, and that his note, having been taken as an asset of the bank, satisfied the banking department and gave notice to depositors and creditors of the bank that it was there as such an asset.

The first question to determine is whether or not appellee was an accommodation maker. "One to be an accommodation maker of a promissory note must not receive any benefit or consideration directly or indirectly by way of

the transaction of which the note was a part, and the transaction must be one primarily for the benefit of the payee." *Farmers Nat. Bank v. Ohman,* 112 Neb. 491.

There is no evidence that appellee knew, at the time the note was given, that the assets of the bank were depleted, or that appellee had knowledge of any difficulties of the bank, or appellee was connected in any way with the continued existence of the bank or was responsible therefor, or that the bank would be closed if the Coe and Patchen notes were charged off, or that appellee acquired any right or interest in the Coe and Patchen paper, or that appellee agreed to put in his note to represent such paper. The very agreement was to the effect that the bank owned certain pop-corn which it could not carry in the pouches of the bank, that appellee's note was put in the bank for the value of this corn, and an agreement made with him that when the corn was sold his note would be paid. The bank gave up nothing of value; it owned the corn in question; and appellee received nothing of value. The Coe and Patchen notes were charged off, but the bank still had an adequate remedy at law as against these notes. The evidence does not show that appellee had knowledge of any kind or nature that his note was to be a substitute note for the Coe and Patchen paper.

The evidence does show the examiner declared appellee's note to be an accommodation note. There was objection to this testimony on the theory that the examiner had not actual knowledge and on the theory of hearsay. It must be conceded that the examiner is charged with a certain duty to examine the bank and report the condition thereof and his findings are competent evidence. This note was listed as being unenforceable and an accommodation instrument for the accommodation of the bank. It is clear under the evidence that appellee did not receive any benefit or consideration for the giving of this note, either directly or indirectly, by way of this transaction, and that the transaction was primarily for the benefit of the bank, the payee. Appellee was an accommodation maker.

The next important assignment of error is the admissibility of parol testimony. This refers to the conversation between Mr. Doran and appellee which was admitted in evidence and which has heretofore been set out. It might be stated that upon each renewal of the original note made by appellee the appellee inquired as to why the corn had not been sold, and it was represented to him each time that the value of the corn was not sufficient at that time to sell it and the bank was holding it for a better market, and appellee each time thereupon renewed the note. Appellant's objection goes to the proposition that this conversation varies or contradicts the terms of a written instrument. In *Empson v. Richter,* 113 Neb. 706, the defendant Essie E. Davis was permitted to testify to a promise made to her at the time she gave her accommodation note to the bank that she would not have to pay the note. In *Spangenberg v. Losey,* 116 Neb. 112, parol testimony was admitted permitting defendants to testify, in substance, that the note was without consideration for the accommodation of plaintiff and for no other purpose. Parol evidence is admissible to prove that the note was given without consideration as accommodation paper and for a special purpose. The parol evidence admitted in the case at bar goes to this very proposition and is admissible.

The next assignment of error important in this case is based upon that portion of the negotiable instruments act, section 4640, Comp. St. 1922, wherein it is stated: "Such a person is liable (speaking of an accommodation maker) on the instrument to a holder for value, notwithstanding such holder at the time of taking the instrument knew him to be only an accommodation party."

In the case at bar appellant did not purchase appellee's note in due course, but did purchase it at a judicial sale from the receiver of the bank, when it was about a year past due, for value. While the provision of the statute cited takes away the defense as against a holder for value that he took the instrument with knowledge that it was accommodation paper and therefore without consideration, it does

not take away other defenses. In this case appellee gave his note to the bank as an accommodation maker for a specific purpose, namely, for the value of said pop-corn then owned by the bank, the agreement being that the bank would cancel appellee's note when the corn was sold. This was not done. When appellee's note was sold by the receiver it was diverted from the purpose for which it was originally given. Appellant, had he examined the records, would have discovered the true status of this paper, and, had he examined the records further, he would have readily ascertained that appellee's note was an accommodation note given for a specific purpose. Appellant had means of knowing about this paper. The evidence discloses that he was a lawyer, 27 years of age, had talked with the officers of the state banking department with reference to the assets of failed banks, and this was a second purchase of assets of a failed bank that he had made. This should have put him on inquiry and amounts to notice. It would then be his duty to exercise ordinary intelligence and understanding and examine the records, which he had an opportunity to do at the banking department. The general rule that whatever puts a party on inquiry amounts, in judgment of law, to notice, provided the inquiry becomes the duty and would lead to a knowledge of the facts by the exercise of ordinary intelligence and understanding, applies to this case. With this in mind appellant had knowledge that appellee's note was diverted from the purpose for which it was given and he cannot maintain an action against appellee thereon.

In reference to that part of the testimony relating to the conversation appellant testified he had with appellee to the effect that appellee's note was given in substitution for the Coe and Patchen notes, which had to be liquidated because the banking department insisted upon a substitution of better paper therefor, and appellee's denial of that conversation, we deem such a conversation a conflict in the evidence, which would be insufficient, upon a question of fact for the jury to determine. It is immaterial whether

this conversation was had or not. The fact remains that the note was given by appellee as an accommodation note for a specific purpose and diverted from the purpose for which it was originally given.

The trial court did not err in directing the jury to return a verdict in favor of appellee. The questions arising during the trial were purely questions of law for the court to decide and justified a directed verdict in appellee's favor. From a consideration of the admissions in the respective pleadings, together with the evidence and the law governing each and every question presented, we deem it unnecessary to consider and find nothing in the other assignments of error advanced by appellant which would present a conflict of evidence upon questions of fact for the jury to determine. The judgment of the trial court in directing a verdict for appellee is sustained by the law and warranted by the evidence and should be and is in all things

AFFIRMED.

GEORGE A. HERRING, TRUSTEE, APPELLEE, V. E. C. WHITFORD ET AL., APPELLANTS.

FILED MAY 9, 1930. No. 27045.

1. **Bankruptcy:** PREFERENCES. A mortgage on real estate executed and delivered by the owners thereof within four months of the filing of a petition in bankruptcy against them and recorded by the mortgagee within that period will, in a suit by the trustee in bankruptcy to cancel the mortgage and to quiet title, be held to be a preference in so far as it mortgages property not exempt.
2. ———:———: EXEMPTIONS. In such circumstances, if the mortgage includes a homestead and the mortgage is valid under the evidence as between the makers of the mortgage and the mortgagee, it will not be held to be a preference as to the exempt statutory homestead.

APPEAL from the district court for Buffalo county: BAYARD H. PAINE, JUDGE. *Affirmed as modified.*

N. P. McDonald, for appellants.

Miller & Randall, contra.

Heard before GOSS, C. J., ROSE, DEAN, GOOD, THOMPSON and DAY, JJ., and THOMSEN, District Judge.

GOSS, C. J.

This is a suit in equity brought by a trustee in bankruptcy to cancel a mortgage executed, delivered and recorded by his bankrupt (joined by her husband) within four months of the filing of the petition in bankruptcy and to quiet title to the real property involved. The mortgagee and mortgagors appeal from a final decree canceling the mortgage and quieting the title in the trustee.

The trustee here sues as trustee of the bankrupt estate of Una W. Donnell. He was also trustee of the bankrupt estate of Junius S. Donnell and as such trustee brought another suit in equity to cancel the same mortgage. The bankrupts are wife and husband. So the two suits, brought in the same court at the same time, are companion cases. They were tried together under a stipulation that the testimony in either case might be used in the other so far as applicable. As a fact, the bills of exceptions seem to be identical, one being a carbon copy of the other. The pleadings seem to vary only as required to show the status of the plaintiff as trustee for the estate of the wife in this suit and as trustee for the estate of the husband in the other.

On the trial it was stipulated, among other things, that on March 5, 1928, a petition for involuntary bankruptcy was filed in the Grand Island division of the United States district court against Una W. Donnell of Kearney, and that on April 2, 1928, she was adjudicated a bankrupt and George A. Herring was duly appointed and qualified as trustee; that then and for years prior the bankrupt and her husband were the owners, as tenants in common, of lots 1, 2, and 3, block 10, Ashland addition to the city of Kearney, in Buffalo county, Nebraska, occupy parts of these lots as a home and claim as their statutory homestead all of said lots except the east fifty feet thereof; that Una W.

Donnell was also the owner of six other described lots in the city of Kearney; that on December 22, 1927, a petition against said Junius S. Donnell was filed in the same court charging bankruptcy, and on February 10, 1928, he was adjudged bankrupt and the same trustee was appointed and qualified; that on November 8, 1927, the Donnells executed and delivered their mortgage to E. C. Whitford, the father of Mrs. Donnell, covering the home lots and the other lots to which we have referred, to secure $22,000 evidenced by four notes, all maturing November 8, 1927; that this mortgage was recorded November 19, 1927; that the Donnells were insolvent from and after May 14, 1927, being the date of the failure of the City National Bank in Kearney and the appointment of a receiver therefor; and that Whitford knew they were insolvent on November 8, 1927. The stipulation also recites claims against each of the Donnells filed as claims, allowed and unpaid in the bankruptcy court; it shows that since this action was begun E. C. Whitford has filed claims in the bankruptcy court against each of the Donnells, based on the indebtedness secured by his mortgage, but stating therein that he does not waive his mortgage security.

From the stipulated facts it is conclusively deduced that, when the Whitford mortgage was executed on November 8, 1927, it was within less than four months before the filing of the petition in bankruptcy of Una W. Donnell on March 5, 1928, as well as within less than four months before the filing of the petition in bankruptcy against Junius S. Donnell on December 22, 1927. Its record on November 19, 1927, was still further within the period. So the executing, delivering and recording of the mortgage all came within the four months' period. Under the evidence the effect, if the Whitford mortgage be held good in whole or in part, will be to lessen to that extent the estate of the bankrupt and the payments to other creditors. So on the face of the transaction itself it would appear to be a preference of Whitford over other creditors and violative of section 60 of the bankruptcy act (11 U. S. C. A. sec. 96).

But the defendants answer this by asserting that Whitford had an agreement for a mortgage which constituted an equitable mortgage. Whitford pleaded that, at the time the money was loaned as evidenced by the notes, the Donnells agreed to execute the mortgage, and that it was pursuant to the agreement that the mortgage was made. The evidence shows that the money was borrowed and used to purchase 200 shares of stock in a new bank called the City National Bank, in Kearney, which began business December 8, 1926. It was a consolidation or reorganization of two banks in Kearney, in one of which the Donnells were stockholders and he was an officer. It was desirable that he be an officer in the proposed new bank. He lacked the money. On November 6, 1926, Junius S. Donnell went with another son-in-law of Mr. Whitford to Nebraska City, where they met Mr. Whitford. Donnell asked Whitford for a loan of $22,000 to buy 200 shares of stock in the proposed bank. Whitford asked what he could give as security. Donnell said he would give a mortgage on the home, owned by himself and wife, and on her other lots in Kearney. Mr. Whitford said: "That wouldn't secure the $22,000." Thereupon, it may be fairly concluded from the evidence, it was understood that all but 10 shares of the stock should be put up as collateral, and that they would make out the mortgage when the organization was completed. Whitford prepared the notes, which were signed and delivered by the Donnells. He sent the $22,000 to a bank in Omaha, where payments by stockholders were received. When the required amount was paid in, the organization was perfected and the stock issued. No mortgage was made until long after the bank failed nor until within four months before the petition in bankruptcy. We have carefully read and considered the evidence and have come to the conclusion that, at most, as against the creditors represented here by the trustee, and as to the real estate not exempt as the homestead, there was merely an agreement to execute a written mortgage in the future. Moreover, we are of the opinion that, if there had been an agreement creating an

equitable mortgage, Whitford could not prevail as against the creditors and as to real estate not exempt.

In *In re Great Western Mfg. Co.*, 152 Fed. 123, Sanborn, J., it was said: "A mortgage or transfer of his property by an insolvent debtor within four months of the filing of a petition in bankruptcy against him, which otherwise constitutes a voidable preference, is not deprived of that character or validated by the fact that it was executed in the performance of a contract to do so made more than four months before the filing of the petition."

In *In re Traut's Estate,* 297 Fed. 458, an oral agreement was made to execute a mortgage on a farm as security for a debt. The mortgage was not finally delivered or recorded until within four months of the filing of the petition in bankruptcy. The circuit court of appeals of this circuit held that, although it be assumed for the sake of argument that the land was subject to an equitable lien created by an agreement made prior to four months, yet such title would pass unincumbered for the benefit of creditors and the mortgage executed pursuant to such agreement was voidable by the trustee. The same rule was announced by the circuit court of appeals for the third circuit in *Hayes v. Gibson,* 279 Fed. 812.

In *Corney v. Saltzman,* 22 Fed. (2d) 268, $5,500 was borrowed and the debtor executed notes therefor and adopted a resolution pledging all of the corporation land for the payment of the notes, all on May 27, 1925. On October 6, 1925, a written mortgage was executed. A petition in bankruptcy was filed November 19, 1925. The circuit court of appeals of the second circuit said that an agreement to make a mortgage may not be regarded as a mortgage, and while such an agreement may give rise to an equitable lien between the original parties, respect must be had for the rights of creditors, and under section 60 (a) (11 U. S. C. A. sec. 96a) a mortgage within four months of the filing of a petition in bankruptcy constitutes a voidable preference which is not made valid by being executed pursuant to a contract to make it, although the contract was made before the commencement of the four months.

So we are of the opinion that the mortgage, to the extent that it attempted to give a lien on that portion of the property of the Donnells that was not exempt, must be considered a preference and cannot prevail over the rights of the creditors represented here by the trustee in bankruptcy.

That leaves the question as to whether the mortgage should be held valid as to the homestead interest of the mortgagors. That interest was not available to creditors. The owners' right to incumber or dispose of it was unrestricted and was a matter of no concern to the creditors or to the trustee in bankruptcy. It is suggested that we should presume that the exemption will be preserved in the bankruptcy court, where Donnell has already applied for it. The present action, however, presents the claim of Mr. Whitford to a valid mortgage on the homestead interest, not the question of awarding exemptions to the bankrupt. The trustee has submitted his action to set aside the mortgage to the state court. This court has jurisdiction to decide whether the mortgage is void in whole or in part. If it is valid as to the homestead interest, it should not be held entirely void on the theory that the federal court can otherwise protect the homestead claimants. The decree appealed from denies Whitford any interest whatever under his mortgage. The validity of this mortgage as a mortgage on the homestead interest was sufficiently pleaded by the mortgagee and by the mortgagors.

It is well known that the homestead of a debtor is incapable of fraudulent alienation. *McCormick v. Brown*, 97 Neb. 545; *Smith v. Neufeld*, 61 Neb. 699; *Jayne v. Hymer*, 66 Neb. 785. Where the value exceeds the allowable exemption, a conveyance can "only be held fraudulent as to creditors in so far as it attempted to convey a surplus of the homestead which would, if still remaining in the hands of the grantor, be subject to sale on execution." *Brown v. Campbell*, 68 Neb. 103. In 27 C. J. 445, we find this text, supported by numerous authorities: "Since the creditors are affected only to the extent that the value of the property conveyed exceeds the value of the homestead, where a con-

veyance includes both property which is exempt as a homestead and a property not so exempt, the creditors are entitled to reach the property not so exempt if the conveyance is fraudulent as to them. This, however, is the extent of their rights on setting aside the conveyance, and they can recover nothing beyond the excess over the homestead right."

Similarly the conveyance of a homestead cannot be set aside as an unlawful preference, except where it includes an interest which is not exempt, and then it is a voidable preference only as to the excess value. Section 67 of the bankruptcy act (11 U. S. C. A. sec. 107) provides that transfers or incumbrances made or given by the bankrupt within four months before the filing of the petition shall be void, where the property "is not exempt from execution and liability for debts by the law of his domicile." Section 70 (11 U. S. C. A. sec. 110) vests title in the trustee to all of the bankrupt's assets "except in so far as it is to property which is exempt."

In the case of *In re Bailey,* 176 Fed. 990, it was held: "The title to the homestead property did not pass to the trustee. The fact that it was mortgaged to certain creditors did not make it assets to be administered in bankruptcy. *Lockwood v. Exchange Bank,* 190 U. S. 294, 23 Sup. Ct. Rep. 751, 47 L. Ed. 1061; *In re Nye,* 133 Fed. 33, 66 C. C. A. 139. * * * A mortgage constituting an unlawful preference, where it includes both exempt and nonexempt property, is only voidable by the trustee as to the nonexempt property, and remains a valid mortgage as to the exempt property. *In re Tollett,* 106 Fed. 866, 46 C. C. A. 11, 54 L. R. A. 222; *Vitzthum v. Large,* 162 Fed. (D. C.), 685; *In re Eash,* 157 Fed. (D. C.) 996." And in *First Nat. Bank v. Lanz,* 202 Fed. 117: "A mortgage given by an insolvent debtor within four months prior to his bankruptcy on his homestead to secure an antecedent debt, although accepted by the creditor with reason to believe that it was intended as a preference, could only operate as a preference as to

the excess in value of the property over $2,000, but as to such excess it was voidable."

There was informality in the act of acknowledging the mortgage but not in the form; and the trustee claims this renders the mortgage invalid. The lack of due acknowledgment of the mortgage is not a defense available to a third party (*Johnson v. Kelley,* 112 Neb. 60; *Cobbey v. Knapp,* 23 Neb. 579; 29 C. J. 925) unless the third party has a valid lien upon the homestead, as in *Trevett, Mattis & Baker Co. v. Reagor,* 112 Neb. 470, and *Anderson v. Cusack,* 115 Neb. 643. A trustee in bankruptcy, as we have seen, has no interest in the exempt portion of the homestead; as to it he is not in privity with the mortgagors.

We are of the opinion that the mortgage is a valid lien to the extent of the $2,000 homestead interest on the portions of the lots actually occupied and claimed by the Donnells as their homestead and as heretofore described, and that the district court erred in the decree in refusing to allow the mortgage as a lien and to decree foreclosure to that extent. We cannot close our eyes to this error by assuming that, perchance, the bankruptcy court might find this exemption in favor of the bankrupts and that they in turn may pay it to the mortgagee. The trustee submitted himself to the jurisdiction of this court when he brought this action. The right to the homestead exemption is controlled by the law of domicile. This court has jurisdiction of the parties and of the subject-matter. Equity and the law under our interpretation suggest that this exemption be assigned by decree here to the mortgagee to whom the mortgagors assigned it by their written contract.

For the reasons stated, the judgment of the district court should be affirmed as to all of the property therein described save as to the homestead interest, and as to the homestead interest the decree should find and decree the mortgage to be a lien of $2,000 thereon and direct a foreclosure thereof on failure to pay the same.

AFFIRMED AS MODIFIED.

The following opinion on motion for rehearing was filed October 10, 1930. *Rehearing denied.*

Heard before GOSS, C. J., ROSE, DEAN, GOOD, THOMPSON, EBERLY and DAY, JJ.

GOSS, C. J.

The appellants duly filed a motion for rehearing and the court ordered oral argument thereon directed especially to the question of the effect of the giving of the Whitford mortgage within four months of the bankruptcy. Upon consultation, after the argument covering that question and the merits of the case generally, it was assigned to the writer of the former opinion to express the views of the court.

So far as the facts are stated in the opinion they are singularly accurate. But the appellants forcefully and ably present their views that the opinion fails in its statement of the law and of the facts. They argue that, under the facts and the applicable law, there was an oral agreement and intent to give such a written mortgage and therefore an equitable mortgage, in accord with the maxim that equity regards that as done which ought to be done; and that, when this culminated in the written mortgage, it was binding upon the trustee in bankruptcy.

As indicated in the opinion, there was no written agreement whatever between the Donnells and Whitford that a mortgage would be required or given; and the mortgage was executed, delivered and recorded, all within the four months' period before the bankruptcy proceedings against either of the Donnells. These conclusions of fact are fully supported by a careful reexamination of the bill of exceptions. The evidence shows that the certified check of Mr. Whitford for the $22,000 loan was paid by his bank on November 27, 1926, and that the notes of the Donnells for a like total, dated November 8, 1926, were executed and delivered to Mr. Whitford "a few days afterwards" according to his own testimony. About the first of December, 1926, he went to California and remained until June, 1927. The new bank probably began business in December, 1926.

It failed on May 14, 1927, and a telegram to that effect was received at Mr. Whitford's Pasadena home on the same day. On that evening Mrs. Donnell arrived there from Nebraska and learned the fact of the failure. On the trial it was stipulated that the Donnells were insolvent from and after May 14, 1927. Mrs. Donnell returned from California to Kearney with Mr. Whitford, arriving there June 30, 1927. Mr. Whitford then asked Donnell if the mortgage had been made out and was informed that it had not. "He said he would make it but he didn't say just when he would make it; that he would carry out his contract." Mr. Whitford testified there was no correspondence or conversation about the mortgage between June and the time he received the recorded mortgage in November, 1927, and that he never received or demanded the bank stock as collateral.

Do the facts, under the rules in force in this jurisdiction, make out a case where we should say that there was an oral agreement for a mortgage and we should apply the maxim that equity requires to be done that which ought to be done, as demanded by appellants?

Section 2451, Comp. St. 1922, now section 36-103, Comp. St. 1929, reads as follows: "No estate or interest in land, other than leases for a term of one year from the making thereof, nor any trust or power over or concerning lands, or in any manner relating thereto, shall hereafter be created, granted, assigned, surrendered, or declared, unless by operation of law, or by deed of conveyance in writing, subscribed by the party creating, granting, assigning, surrendering or declaring the same."

As affecting probably the major portion in value of the property involved—that is, the homestead of the Donnells —we are confronted by section 2819, Comp. St. 1922, now section 40-104, Comp. St. 1929: "The homestead of a married person cannot be conveyed or incumbered unless the instrument by which it is conveyed or incumbered is executed and acknowledged by both husband and wife."

Only a few of the many cases on various states of fact under this homestead statute need be cited to show that it

means what it says: *Whitlock v. Gosson,* 35 Neb. 829; *Teske v. Dittberner,* 70 Neb. 544; *Solt v. Anderson,* 71 Neb. 826; *Trevett, Mattis & Baker Co. v. Reagor,* 112 Neb. 470. In the last case cited above it was also held that, even though husband and wife failed to assert the invalidity of a prior mortgage on the homestead, yet a subsequent mortgagee holding a valid mortgage on the homestead may take advantage of the invalidity.

As to the effect of the general statute of frauds, section 2451, Comp. St. 1922, heretofore quoted, we have a learned opinion by Judge Frank Irvine, which discusses the principles which we think are involved in the case before us. *Bloomfield State Bank v. Miller,* 55 Neb. 243. There was involved the deposit of title deeds but without any contract in writing; and there the loan had actually been received by the one who deposited the deeds as security. The opinion discusses the meaning of the statutory phrase "by operation of law" and holds that it does not embrace cases where the creation of the estate depends solely on the intention of parties to a contract; holds that a mortgage by the deposit of title deeds, without writing, violates the statute of frauds, is contrary to the policy of the recording acts and is not effective in this state; holds that a court of equity cannot give effect to an oral contract declared void by the statute of frauds under pretense of aiding an imperfect attempt to execute a contract; and, finally, holds that an equity court cannot enforce such a mortgage on the ground that the consideration has been actually paid. It seems to us that the case is so analogous in principle and so alike in general fact that we cannot accede to the position of the appellants in the case at bar without overruling this decision which has stood for a generation as the rule in this jurisdiction. This decision has been cited with approval in other jurisdictions. We content ourselves with citing *Sleeth v. Sampson,* 237 N. Y. 69. The case was in the court of appeals and the opinion was by Judge Cardozo. It was held that advancing money in consideration of an agreement to secure it by mortgage on real property is not suffi-

cient part performance to take it out of the statute of frauds. After citing *Bloomfield State Bank v. Miller,* 55 Neb. 243, the opinion says: "A different holding would open wide the door to the entry of evils against which the statute is directed. Any one who made a loan would be free to transmute it into a loan with a lien upon the land." One who has performed, by payment only, his part of a contract for an interest in land under an oral contract that is contrary to the statute of frauds is ordinarily relegated to his remedy to recover back the money paid. 25 R. C. L. 571, sec. 170.

It will thus be seen that equity could not require the Donnells to make a mortgage to Whitford because they had promised to do so, nor because he had performed his part of the oral agreement and had loaned them the money agreed upon. Nor do we think we should decree that, when they have made a mortgage in pursuance of a previous oral agreement, it shall relate back and take effect as of a date when the agreement was only oral in order to permit the parties to it to evade the preferences denounced by the bankruptcy law. In the circumstances this would be especially abhorrent and would be to sanction a constructive fraud against the creditors of the bankrupts. For we cannot close our eyes to the implication naturally arising from the facts: Whitford and Donnell were both bankers of long experience. Both knew the property mortgaged was all the unincumbered property Donnell had. Both must have known that it would have been harmful to the new bank in Kearney if its customers and creditors knew that Donnell, one of its chief officers, had mortgaged his home. Secret equities between relatives are looked upon with suspicion.

We believe that our former opinion was right and that we went as far as equity and the law demanded when, because all the parties were before us, we permitted the homestead exemption in the statutory amount to be set off to Whitford and considered as if coming under the mortgage. The rehearing should be denied.

REHEARING DENIED.

GEORGE A. HERRING, TRUSTEE, APPELLEE, V. E. C. WHITFORD ET AL., APPELLANTS.

FILED MAY 9, 1930. No. 27046.

1. **Bankruptcy**: PREFERENCES. A mortgage on real estate executed and delivered by the owners thereof within four months of the filing of a petition in bankruptcy against them and recorded by the mortgagee within that period will, in a suit by the trustee in bankruptcy to cancel the mortgage and to quiet title, be held to be a preference in so far as it mortgages property not exempt.
2. ———: ———: EXEMPTIONS. In such circumstances, if the mortgage includes a homestead and the mortgage is valid under the evidence as between the makers of the mortgage and the mortgagee, it will not be held to be a preference as to the exempt statutory homestead.

APPEAL from the district court for Buffalo county: BAYARD H. PAINE, JUDGE. *Reversed, with directions.*

N. P. McDonald, for appellants.

Miller & Randall, contra.

Heard before GOSS, C. J., ROSE, DEAN, GOOD, THOMPSON and DAY, JJ., and THOMSEN, District Judge.

GOSS, C. J.

This is a suit in equity commenced by the trustee in bankruptcy of the estate of Junius S. Donnell to cancel a real estate mortgage executed by Donnell and his wife, Una W. Donnell, within four months of the filing of separate petitions in bankruptcy against these mortgagors. It is a companion case to *Herring v. Whitford,* No. 27045, *ante,* p. 725, and reference is made to our opinion therein for a statement of the case and for our conclusions thereon. The pleadings were identical except that the trustee sued on behalf of the bankrupt husband here and for the estate of the wife in the other case. In both cases it was sought to cancel the same mortgage. The bills of exceptions are identical, one being a copy of the other. The decrees of the district court, however, were quite different.

In the suit brought on behalf of the wife's bankrupt

estate, the mortgage to Whitford was canceled and the title to the property quieted in the trustee by the decree of the district court. In the present case, the findings of the decree, as shown in the record, are rather confusing; and the order of the court directs a foreclosure in favor of E. C. Whitford as to the east 50 feet of lots 1, 2, and 3, in block 10, of Ashland addition, but omits any reference to the remainder of those lots and to six other lots referred to in the findings and the evidence. These discrepancies evidently arise out of a misunderstanding as to what constituted the homestead, and out of the failure, in drawing the order, to make any reference to the property involved other than the homestead lots. On the argument both parties agreed that the judgment of the district court would have to be reversed.

The facts in the two actions are the same; the parties are in the identical position in this case they were in the one just preceding it; the only difference is that in that case the trustee in bankruptcy represented the estate of the wife and in this he represents the estate of the husband. The decisions in the two suits should be the same and our opinion in No. 27045 is incorporated herein in this case, No. 27046.

For the reasons there given, the judgment appealed from in this cause should be reversed and the cause remanded, with instructions to render a decree allowing Whitford's mortgage as a first lien to the extent of $2,000 on the same real estate as in No. 27045, found to be the homestead, and to allow a foreclosure thereof; and the decree should quiet the title in the trustee as to all the rest of the real estate and as to the excess over the $2,000 homestead interest.

REVERSED.

The following opinion on motion for rehearing was filed October 10, 1930. *Rehearing denied.*

Heard before GOSS, C. J., ROSE, DEAN, GOOD, THOMPSON, EBERLY and DAY, JJ.

GOSS, C. J.

This is a companion case to *Herring v. Whitford, ante*, p. 725. Oral argument on the motion for rehearing was ordered and had. The printed motions and briefs for rehearing were identical and the ruling in this case must naturally follow that in the other.

It is unnecessary to repeat the contents of the opinion in the other case, but it is by reference incorporated herein and made a part hereof. For the reasons there given, the motion for rehearing is denied.

REHEARING DENIED.

STATE, EX REL. CENTRAL REALTY & INVESTMENT COMPANY, APPELLANT, V. ADAM MCMULLEN, GOVERNOR, ET AL., APPELLEES.

FILED MAY 9, 1930. No. 27187.

1. **Mines and Minerals**: SALT SPRINGS: ALIENATION. The object in the adoption of section 20, art. III, of the Nebraska Constitution, is to prevent the alienation by the state of all salt springs of commercial value. But where the brine yield of such salt springs, as in the present case, is not of sufficient salt content to warrant the extraction and manufacture of salt of merchantable quality, a deed may be executed and delivered to the purchaser of such saline lands, but with the reservation plainly stated in such deed that, if salt springs of commercial value should at any time after the execution and delivery of such deed or deeds develop in such lands, such salt springs shall belong to the state.
2. ———: ———: RESERVATION. "Congress, by reserving salt springs, could only have intended to include those that were valuable, for the purpose of making salt. This is evident from the reservation of as many contiguous sections as the president should deem necessary." *State of Indiana v. Miller*, 3 McLean (U. S. C. C.) 151.
3. **Constitution**: CONSTRUCTION. "The language of the Constitution is to be interpreted with reference to the established laws, usages and customs of the country at the time of its adoption." *In re Hammond*, 83 Neb. 636.

APPEAL from the district court for Lancaster county:

JEFFERSON H. BROADY, JUDGE. *Reversed, with directions.*

Hall, Cline & Williams, for appellant.

C. A. Sorensen, Attorney General, and *George W. Ayres, contra.*

Heard before GOSS, C. J., ROSE, DEAN, GOOD, THOMPSON and EBERLY, JJ., and LIGHTNER, District Judge.

DEAN, J.

The Central Realty & Investment Company, relator, began this action to obtain a writ of mandamus requiring the Honorables, Adam McMullen, then governor, Charles W. Pool, then secretary of state, and Dan Swanson, then and now commissioner of public lands and buildings, to execute and deliver to the relator a deed to a tract of 120 acres of saline lands located in Lancaster county. It is alleged that the tract was purchased from the state in 1904 by J. A. Buckstaff and "assigned to, and completed by," the relator. From a judgment denying the writ an appeal has been prosecuted to this court.

The relator alleges the following in respect of the lands involved herein, namely: That on June 15, 1904, the state of Nebraska entered into a contract by the terms of which the state of Nebraska agreed to sell and J. A. Buckstaff agreed to buy the northeast quarter of the southwest quarter and the north half of southeast quarter of section 21, township 10, range 6, Lancaster county. And the relator also alleges that the lands in suit consisted of a part of the saline lands received from the federal government by the state under an enabling act, and that assignments of the contract were filed and recorded in the office of the land commissioner and approved by him. It appears that the relator, as assignee thereof, paid to the Lancaster county treasurer the balance due on the above contract and a duplicate receipt was filed in the office of the land commissioner and approved as correct. The relator pleads that the contract was fully performed, and demanded that a deed be executed by the respondents and delivered to the realty company, but alleges that the respondents then, and

at all times thereafter, have refused to execute such deed.

Answers were filed by the secretary of state and by the land commissioner, wherein they severally allege, and plead as a defense, that the refusal to execute a deed to the above described lands was based on the fact that section 21 of the land contained salt springs. And the answer filed by the Honorable Governor McMullen was to the same effect, except that he stated that he was willing to execute a deed, but with the provision that all of the salt springs involved herein should be reserved in their entirety to the state. Before the present case was reached for trial in the district court the Honorable Arthur J. Weaver was elected governor and the Honorable Frank Marsh was elected secretary of state, and these state officers, as successors to the former officers named above, were substituted as respondents in the present suit.

Section 11 of the enabling act, in respect of saline lands in Nebraska, was passed and adopted April 19, 1864, by the congress, and reads:

"And be it further enacted, that all salt springs within said state, not exceeding twelve in number, with six sections of land adjoining, or as contiguous as may be to each, shall be granted to said state for its use, the said land to be selected by the governor thereof, within one year after the admission of the state, and when so selected to be used or disposed of on such terms, conditions, and regulations as the legislature shall direct." 13 U. S. St. at Large, ch. 59, p. 47.

And section 20, art. III, of the Nebraska Constitution, contains this language:

"The salt springs, coal, oil, minerals or other natural resources on or contained in the land belonging to the state shall never be alienated, but provision may be made by law for the leasing or development of the same."

The land in suit is contiguous to the twelve salt springs to which reference is herein made and they were selected under the above cited enabling act. Large sums of money were expended by the state, when the land was first ac-

quired, in the development of the saline lands, and wells were sunk to a great depth. From the evidence of certain resident witnesses, and also from certain field notes of the surveyor, it appears that the land in suit was then described as being "mostly low barren flat unfit for cultivation with a great many fine salt springs." And it appears that the body of water that is located on or near the land in controversy contains some salt. But the mere presence on the land of salt springs, with but a limited salt content, does not of course necessarily lead to the conclusion that such springs, or any part of the lands in question, are sufficiently charged with salt to make them of commercial value. Clearly the object in the adoption of section 20, art. III, of the Nebraska Constitution, was to prevent the alienation by the state of salt springs of commercial value. But where the brine yield of such salt springs, as shown by the report of the state geologist at the time in the present case, was not of sufficient salt content to warrant the extraction and manufacture of salt of merchantable quality, a deed may be executed and delivered to the purchaser of such saline lands, but with the reservation plainly stated in such deed that, if salt springs of commercial value should at any time after the execution and delivery of such deed or deeds develop in such lands, such salt springs shall belong to the state.

In *Davis' Admr. v. Weibbold,* 139 U. S. 507, the court said: "The exceptions of mineral lands from preemption and settlement and from grants to states for universities and schools, for the construction of public buildings, and in aid of railroads and other works of internal improvement, are not held to exclude all lands in which minerals may be found, but only those where the mineral is in sufficient quantity to add to their richness and to justify expenditure for its extraction, and known to be so at the date of the grant. There are vast tracts of country in the mining states which contain precious metals in small quantities, but not to a sufficient extent to justify the expense of their exploitation. It is not to such lands that the term

mineral in the sense of this statute is applicable. On this subject there has been great uniformity of decision by those courts of the states and of the United States which have had the most frequent occasion to consider the subject, and by the land department."

The following recital appears in 35 Land Decisions, 1, in respect of a grant to the territory of New Mexico for the benefit of its university, and is a part of section 3 of the act of June 21, 1898: "'All saline lands in said territory' includes only such lands as contain common salt (sodium chloride), in its various forms of existence or deposit, and in commercially valuable quantities." And this observation appears in the body of the same decision: "Apparently, the slightest trace of sodium chloride in the soil or water is depended upon as determining the fact that the land which contains it is 'saline' in the legal sense of the term. If this extended use were permitted there is hardly a square mile in the United States west of the 100th meridian which could not with some justice be claimed as a 'saline.'"

In *Deffeback v. Hawke*, 115 U. S. 392, 404, Mr. Justice Field said: "It is plain * * * that no title from the United States to land known at the time of sale to be valuable for its minerals of gold, silver, cinnabar, or copper can be obtained under the preemption or homestead laws or the town-site laws, or in any other way than as prescribed by the laws specially authorizing the sale of such lands, except in the states of Michigan, Wisconsin, Minnesota, Missouri, and Kansas. We say 'land *known* at the time to be *valuable* for its minerals,' as there are vast tracts of public land in which minerals of different kinds are found, but not in such quantity as to justify expenditures in the effort to extract them. It is not to such lands that the term 'mineral' in the sense of the statute is applicable."

In *State of Indiana v. Miller*, 3 McLean (U. S. C. C.) 151, the court said: "Congress, by reserving salt springs, could only have intended to include those that were valuable, for the purpose of making salt. This is evident from

the reservation of as many contiguous sections as the president should deem necessary."

In *State v. McKelvie*, 111 Neb. 224, the action was there begun to require the execution of a deed in fee simple to certain common-school lands held by the relator under a sale certificate. We held that the relator was entitled to a deed to the land. And in *In re Hammond*, 83 Neb. 636, we said: "The language of the Constitution is to be interpreted with reference to the established laws, usages and customs of the country at the time of its adoption."

In *Hinz v. Musselshell Co.*, 82 Mont. 502, the Montana court said: "Our state Constitution must be construed in the light of the history of the commonwealth, the surrounding circumstances, the subject-matter under consideration, the object sought to be attained, as well as the system of laws which were in force in the territory at time of its adoption."

It is evident in the present case that, at the time the salt springs were selected, the belief persisted that the salt springs contained salt of much value and that they might be a source of great wealth to the state. And, as above mentioned, large sums of money were expended in the development of the manufacture of salt, but without corresponding results. In view of the conceded worth of salt springs to the people of any commonwealth, however, it behooves the state to reserve the title to such salt springs for the prospective needs of the present and future generations, should the salt springs be of commercial value later.

We conclude that the judgment of the district court must be and it hereby is reversed, with directions that the writ be allowed requiring respondents to issue a deed to the 120 acres of saline lands involved herein, with the reservation of salt springs, however, which may in the future be of commercial value, to the state, all as hereinbefore pointed out.

REVERSED.

FRED GEISS ET AL., APPELLANTS, V. TRINITY LUTHERAN CHURCH CONGREGATION ET AL., APPELLEES.

FILED MAY 9, 1930. No. 27248.

1. **Courts:** SUITORS: INCONSISTENCY. A litigant may not invoke the aid of a court of equity and at the same time deny that it has jurisdiction to administer the character of relief for which he prays.
2. **Religious Societies:** ECCLESIASTICAL COURTS: JURISDICTION. Where two church societies, each affiliated with and owing allegiance to a separate and distinct religious organization, claim and assert title and right of possession to a church building and the lots on which it is situated, the ecclesiastical courts of neither organization has jurisdiction to determine the legal rights of the respective societies. Such a situation presents a case for determination by the civil courts.
3. ———: PROPERTY RIGHTS: JURISDICTION. Civil courts will exercise their jurisdiction to protect the property rights of religious societies, even though the one invading such rights may be a rival religious organization.
4. ———: GOVERNMENT. A religious society may, for its government, adopt a constitution, and its provisions will be binding upon the members of the society if not in conflict with law or contrary to public policy.
5. ———: TRANSFER OF PROPERTY. Where a religious society has acquired real estate for church purposes and adopted a constitution, which provides that the church property shall not be alienated so long as there remain three male members holding to the name of the congregation and recognizing the church government, it is not within the power of a bare majority of the congregation to alienate or transfer title to the church property to any other church society, when there are three or more male members who do not consent thereto, but who, in the language of the constitution, hold to the name of the congregation and recognize the church government.
6. ———: ———. Where individuals, who are members of a religious society, but not officers thereof, take title to real estate and hold it for the church society, they are mere naked trustees, and a conveyance made by them, without the consent of the society, conveys no title to the grantee, who had knowledge that the church society was the equitable owner thereof.
7. **Laches.** "Laches does not, like limitation, grow out of the mere passage of time; but it is founded upon the inequity of permitting the claim to be enforced—an inequity founded upon

some change in the condition or relations of the property or the parties." *Galliher v. Cadwell*, 145 U. S. 368.

8. **Quieting Title**: LACHES. Mere delay, not exceeding the time limited by the statute, in bringing an action to cancel a deed and quiet title to real estate will not bar plaintiff from the relief sought, where defendant has not been prejudiced by such delay.

APPEAL from the district court for Cheyenne county: EARL L. MEYER, JUDGE. *Reversed, with directions.*

Kepler & Kratz, for appellants.

Radcliffe & Wehmiller, contra.

Heard before GOSS, C. J., ROSE, DEAN, GOOD, EBERLY and DAY, JJ., and WRIGHT, District Judge.

GOOD, J.

This is an action in equity, the primary object of which is to determine which of two religious societies has title and right of possession to a church edifice and the lots on which it stands, in the village of Dalton, Cheyenne county, Nebraska. There are other parties and other issues, to which reference will be made in the course of this opinion.

The action was brought by Evangelical Lutheran Trinity Congregation of Dalton and by certain individuals as members of said church organization, on behalf of themselves and all other members of the said society, and against Trinity Lutheran Church Congregation and the trustees of the latter organization, and also against certain individuals who had formerly held title to the lots in question. For convenience, the two church societies will be referred to as plaintiff and defendant, and the other parties to the action will be separately designated.

Plaintiff asks to have a certain deed of conveyance canceled and title to the church property quieted in it. For a defense defendant challenges the jurisdiction of the court, claims title by virtue of certain actions of the congregation, hereinafter referred to, and also alleges that plaintiff has been guilty of such laches as will prevent it from main-

taining this action. Trial resulted in a decree quieting title to the property in the defendant and foreclosure of mortgages held by cross-petitioner. Plaintiffs have appealed.

There is but little conflict in the evidence, and it may be remarked at the outset that all of the witnesses who have testified on either side of the case have shown the utmost consideration and forbearance, each for the other, and have refrained from any show of bitterness or personal animosity that usually characterizes this kind of litigation. The fine spirit of fairness displayed by each party and its adherents is to be commended.

The record discloses that in 1913 a small number of individuals organized the plaintiff church society, adopted a name, and affiliated with the Nebraska Synod, which is a subordinate, affiliated organization of the General Synod of Evangelical Lutheran Church in America. Three of the members, J. Frerichs Mintkin, Adolf Kunzie, and O. J. Willms, as a donation to the church organization, purchased three lots for a church site. Title was taken in their individual names for the benefit of the church. The members of the organization subscribed and raised funds, which, together with funds advanced by cross-petitioner Board of Church Extension of the General Synod of Evangelical Lutheran Church, were used to construct the church edifice. The building was completed in 1914. The constitution adopted by the plaintiff provided for the election of three trustees to have charge of the church property and administer its business affairs. Through neglect the title to the lots was never conveyed to plaintiff's official trustees. The congregation was small and undoubtedly unable to pay for and maintain a pastor to minister to it regularly. A pastor, of the same denomination, at another location, some 20 miles distant, was assigned to and held services in the new church ordinarily each alternate Sunday. It appears that sometimes this minister was unable to fill his regular appointments.

On January 2, 1920, at an annual meeting of the church congregation, the following proposition was voted upon:

"Shall we leave this Synod and go to the Missouri Synod?" The Missouri Synod is an entirely distinct religious organization from that of the Nebraska Synod, operating under the General Synod. At this meeting four persons voted to go to the Missouri Synod; two, and perhaps three, voted against the proposition. There were other members of the church society not present, and some who were present but did not vote.

The constitution adopted by the plaintiff contained, among other things, the following: "All property in possession of this Congregation shall belong to it, and shall not be taken away nor craftily alienated so long as there remain three male members holding to the name of the Congregation and recognize this Church Government." The evidence discloses that at the time of the meeting in January, 1920, and ever since, there were and are more than three male members of the plaintiff, holding to the name of the congregation and who recognize its church government. The original members of the plaintiff who were not in favor of transferring their allegiance to the Missouri Synod apparently believed, at the time, that the vote taken was conclusive and had the effect of transferring plaintiff's church property to the defendant. Of the three individuals who had taken title to the church property for the plaintiff, two had removed from the vicinity and the third had died. In 1924 the defendant procured the signatures to a deed of the two surviving individuals and of the widow of the third individual who had formerly held title to the church property for the plaintiff. Later, the members of the plaintiff church who had remained loyal to its name and church government were informed that they had not lost title to the church property, but were entitled to its possession. They sought, without avail, to obtain, by peaceable means, possession and to regain title. In 1929 this action was instituted.

The defendant's objection that the court was without jurisdiction has little or no merit. Defendant in its answer asks affirmative relief. It prays to have the title to

the church property quieted in it. It seeks the same character of relief as does the plaintiff. A litigant may not invoke the aid of a court and at the same time deny that it has jurisdiction to administer the character of relief for which he prays.

We think it is quite clear that the ecclesiastical courts could not have administered the relief desired. The Missouri Synod and the defendant church affiliated therewith were not subject to the jurisdiction of the Nebraska Synod or of the General Synod, with which the plaintiff church was affiliated. It is also apparent that the ecclesiastical courts could not determine the title to the real estate and compel a conveyance from one to the other. Where two different church societies are entirely separate in their allegiance to higher church organizations, and each claims title to real estate constituting church property, the ecclesiastical courts of neither organization has jurisdiction to determine title or right of possession. Such a situation presents a case for determination by the civil courts. Civil courts will exercise their jurisdiction to protect the property rights of religious societies, even though the one invading such rights may be a rival religious organization. *Rottmann v. Bartling,* 22 Neb. 375; *Avery v. Baker,* 27 Neb. 388; *Bonacum v. Harrington,* 65 Neb. 831; *Parish of the Immaculate Conception v. Murphy,* 89 Neb. 524; *Kenesaw Free Baptist Church v. Lattimer,* 103 Neb. 755; *Reichert v. Saremba,* 115 Neb. 404; *Schlichter v. Keiter,* 156 Pa. 119, 22 L. R. A. 161.

We next inquire as to what, if any, title to the church property the defendant acquired by the vote taken in January, 1920, and the deed executed by the individuals who had formerly held title for the plaintiff church. The above quoted provision of plaintiff's constitution seems to clearly limit the power of the church society to alienate its property so long as there remain three male members holding to the name of the congregation and recognizing its church government.

It is a well-recognized principle of law that a church society may adopt for its government a constitution, and

that, unless its provisions are in conflict with the statute or contrary to public policy, it will be binding upon the members of the church. As already observed, there are more than three male members who were, at the time of the attempted alienation, and ever since have been, holding to the name of the congregation and recognizing its church government. Its constitution, under existing conditions, was a bar to the transfer of the church property.

The constitution of plaintiff also contained the following provisions:

"Our Congregation is an organization of Evangelical Christians and shall be known as the Evangelical Lutheran Trinity Church.

"This Congregation is called Evangelical because built on the faith of the Apostles and Prophets, Jesus Christ himself being the Chief Corner Stone. Lutheran because it acknowledges the faith and doctrines of our fathers in the Church which holds this name. * * *

"Since our Congregation holds the faith of the General Synod of the Evangelical Lutheran Church in America, and since it desires to maintain that position, therefore it shall be affiliated with a District Synod which represents that General Body."

The Nebraska Synod above mentioned is a district synod representing the General Synod referred to.

We are forced to the conclusion that the vote of the congregation, taken in January, 1920, did not operate to transfer the title or right of possession of the church property to the defendant.

So far as the execution of the deed by the individuals who took title in trust for the plaintiff is concerned, it may be noted that they were not officers of the church; they had no authority to act for the church; they were naked trustees, merely holding title for the church, and any action on their part, in attempting to transfer the title to any other society than the one for which they were holding it in trust, was without authority. Defendant, having knowledge of the situation, could thereby acquire

no title or valid claim to the church property. Moreover, no attempt was made to comply with the provisions of section 571, Comp. St. 1922, which purports to regulate the manner in which church property may be alienated.

Has the plaintiff been guilty of such laches as will deprive it of the right to recover in this action?

In *Galliher v. Cadwell,* 145 U. S. 368, 36 L. Ed. 738, it was held: "Laches does not, like limitation, grow out of the mere passage of time; but it is founded upon the inequity of permitting the claim to be enforced—an inequity founded upon some change in the condition or relations of the property or the parties."

In a note to *Felix v. Patrick,* 36 L. Ed. (145 U. S. 317) 719, 720, we find the following: "The objection of laches is not tenable to defeat an equity cause, where there has been no material change in defendant's position, or in the subject-matter of the action, caused by plaintiff's delay; or where the plaintiff has been ignorant of his rights, or, though apprehensive of them, there was such an obscurity in the transaction that it was difficult to gain the facts upon which to maintain the action"—citing *Blennerhassett v. Day,* 2 Ball & B. (Ir. Ch.) 104, and other cases.

"Mere delay in bringing an action to set aside a judgment and sale in foreclosure, not exceeding the time limited by the statute, and where defendant is not prejudiced, will not bar relief. *McMurray v. McMurray,* 66 N. Y. 175." At page 721, it was said: "Where a legal right is involved, and upon grounds of equity jurisdiction the courts have been called upon to sustain it, the mere laches of the party seeking redress, unaccompanied by circumstances amounting to an estoppel, constitutes no defense."

In *Garden Cemetery Corporation v. Baker,* 218 Mass. 339, it was said, in effect, that, where no one has been misled to his harm in any legal sense by the delay and the situation has not materially changed, the delay is not fatal. And in *Kentucky Block Cannel Coal Co. v. Sewell,* 249 Fed. 840, it was held that, the defense being an equitable one, the lapse of time and the relations of the defendants to the

rights must be such that it would be inequitable to permit plaintiffs to maintain their rights.

In *Kimberly-Clark Co. v. Patten Paper Co.* (153 Wis. 69) 140 N. W. 1066, it was held: "Where each of the parties to an action seeks affirmative relief against the other, arising out of the same state of facts, one cannot claim that the other is guilty of laches."

This court has held in *Fitzgerald v. Fitzgerald & Mallory Construction Co.*, 44 Neb. 463: "Mere lapse of time, unaffected by other circumstances, will not bar the right to rescind a voidable transaction."

In *Hawley v. Von Lanken*, 75 Neb. 597, it was held: "In applying the doctrine of laches the true inquiry should be whether the adverse party has been prejudiced by the delay in bringing the action and whether a reasonable excuse is offered for the delay." The ruling therein was reaffirmed in *Hawley v. Pound*, 76 Neb. 130, and *Hawley v. Barry*, 76 Neb. 131.

In *Harrison v. Rice*, 78 Neb. 654, it was held: "Mere forbearance to begin an action for specific performance, not extending beyond the period of the statute of limitations, and not accompanied by any conduct misleading or tending to mislead the defendant to his damage, or to lull him into a belief that his repudiation of the contract has been acquiesced in, will not bar the plaintiff of his right."

The rule in *Hawley v. Von Lanken, supra*, was reaffirmed in *Harrison v. Rice*, on rehearing, 78 Neb. 659. A similar rule was announced in *Northwest Ready Roofing Co. v. Antes*, 117 Neb. 121.

From the record it does not appear that defendant has been prejudiced by the delay in bringing the action. There is nothing to show that it has expended any sum upon the upkeep or repair of the church building, or has in any wise been placed in a worse plight than if the action had been brought at an earlier period. Applying the rules announced in the foregoing cited authorities to the facts disclosed by the record, we are required to hold that the mere delay in bringing the action did not bar plaintiff of its

right to relief. This disposes of the defenses urged by defendant. Plaintiff was the owner of the church property. It has never been lawfully divested of its title and right of possession. A decree should have been entered in the district court, quieting title in the plaintiff, awarding it possession of the property, and canceling the deed executed by the individuals, who had formerly held title for plaintiff, and whereby an attempt was made to convey the title to the defendant.

A decree of foreclosure was entered in favor of cross-petitioner upon its mortgages. Such decree was sought by cross-petitioner only in the event that title was not quieted in the plaintiff. Since the title should have been quieted in plaintiff, the decree of foreclosure in favor of cross-petitioner should be vacated and set aside.

The judgment of the district court is reversed, and the cause remanded, with instructions to enter a decree, canceling the deed whereby the defendant attempted to acquire title, and quieting title in the plaintiff, or, rather, in its official trustees, and for this purpose further evidence should be taken to determine who are the individuals holding the offices of trustees, and the title should be quieted in the name of the trustees and their successors in office.

The judgment of the district court is reversed, and the cause remanded, with directions to enter judgment in conformity with this opinion.

REVERSED.

JOE ADAMS, APPELLEE, V. CITY OF OMAHA, APPELLANT.

FILED MAY 9, 1930. No. 27291.

1. Appeal: DIRECTION OF VERDICT. In the trial of a law action to a jury, where, at the close of plaintiff's evidence, each party, without reservation, moves for a directed verdict, each thereby invites the court to discharge the jury, determine the facts, and apply the law thereto. Under such conditions, after the jury have been discharged and the court has announced that it finds for plaintiff, a request by defendant to introduce evidence is

addressed to the discretion of the trial court, and a denial of the request will not be held erroneous in the absence of a showing that defendant has been prejudiced thereby. Error will not be presumed, but must affirmatively appear.

2. **Municipal Corporations**: POWERS. The law confers on cities of the metropolitan class authority, but does not require them, to construct storm sewers.
3. ———: STORM SEWERS: INADEQUACY: LIABILITY. Cities of the metropolitan class are not liable for damages caused by surface water, because its storm sewers are of insufficient capacity to carry all of such water.
4. ———: SURFACE WATERS: DAMAGES: LIABILITY. In an action against a city of the metropolitan class to recover damages caused by surface water flooding plaintiff's premises, no recovery can be had unless it is shown that some negligent act or omission by the city caused the surface water to accumulate and be cast on plaintiff's premises.

APPEAL from the district court for Douglas county: ARTHUR C. THOMSEN, JUDGE. *Reversed.*

John F. Moriarty and *Thomas J. O'Brien*, for appellant.

J. C. Travis, contra.

Heard before GOSS, C. J., DEAN, GOOD, THOMPSON, EBERLY and DAY, JJ.

GOOD, J.

Action for damages from surface waters flooding plaintiff's premises, alleged to have been caused by defendant's negligence. Defendant denied any negligence. Plaintiff had the judgment, and defendant has appealed.

At the close of plaintiff's evidence, both parties moved for a directed verdict. Thereupon, the trial court discharged the jury and announced its purpose to render judgment for plaintiff. Defendant then requested, and was denied, permission to introduce evidence. This ruling is assigned as error.

This court has frequently held that, where each party to a jury trial moves for a directed verdict, each consents that the court shall find the facts and apply the law thereto. *Segear v. Westcott*, 83 Neb. 515; *Dorsey v. Wellman*, 85 Neb. 262; *Henton v. Sovereign Camp, W. O. W.*, 87

Neb. 552; *Martin v. Harvey,* 89 Neb. 173; *Prucha v. Coufal,* 91 Neb. 724; *Krecek v. Supreme Lodge of F. U. A.,* 95 Neb. 428; *Fairbanks, Morse & Co. v. Austin,* 96 Neb. 137; *Hamilton v. North American Accident Ins. Co.,* 99 Neb. 579; *Modern Woodmen of America v. Berry,* 100 Neb. 820; *Bank of Benson v. Gordon,* 103 Neb. 508; *Merchants-Mechanics First Nat. Bank v. Cavers Elevator Co.,* 105 Neb. 321; *Riverton State Bank v. Walker,* 107 Neb. 672; *Waters v. Nebraska Mutual Ins. Co.,* 108 Neb. 1; *Pearlman v. Snitzer,* 112 Neb. 135. It is true that in most, if not all, of these cases the motions were made at the close of all the evidence on both sides.

In *Dunn v. Bozarth,* 59 Neb. 244, it was held: "The reception of evidence tendered by the defendant after a decision against him on a demurrer to plaintiff's evidence is not error." This ruling was followed and approved in *Riley v. Missouri P. R. Co.,* 69 Neb. 82.

In *Davison v. Land,* 89 Neb. 58, it was held: "At the conclusion of the plaintiff's evidence, plaintiff and defendant each moved the court for a directed verdict. Defendant then asked to withdraw his motion and to be allowed to introduce evidence. This request was refused, and a verdict directed for plaintiff. *Held,* that in such case prejudicial error will not be presumed, and the judgment of the district court will be affirmed under section 145 of the Code, where the record does not disclose any facts showing that defendant suffered any prejudice or that he had a substantial defense to the action." In the opinion it was said: "Where parties each request a direction to the jury for a verdict in their favor they submit the case to the court upon an issue of law. *Segear v. Westcott,* 83 Neb. 515; *Dorsey v. Wellman,* 85 Neb. 262. Where a party seasonably desires to withdraw such a request and to introduce evidence, the court should allow it to be done. It is elementary, however, that error will not be presumed, but must affirmatively appear."

In *Knies v. Land,* 116 Neb. 387, at the conclusion of plaintiff's testimony, each party moved for a directed ver-

dict. It was held: "Where both parties to a law action then being tried to a jury ask for a directed verdict, the action of the court in granting one request has the same force and effect as would a verdict of the jury. Neither party can thereafter predicate error on the court's failure to submit the case to the jury."

In the instant case, each party moved for a directed verdict without any reservation, and thereby each party invited the court to discharge the jury and decide the case upon the record then made. Not until after the court had discharged the jury and indicated that its holding would be for the plaintiff did the defendant make a request to introduce evidence. It was then too late for it to demand this as a matter of right. It was within the discretion of the trial court to grant or refuse the request. The record does not indicate what evidence the defendant desired to introduce. No offer was made as to what any witness would testify. The record does not apprise us as to whether defendant was prejudiced by the refusal. Error will not be presumed, but must affirmatively appear.

It is contended that the trial court committed prejudicial error in finding for the plaintiff, and it is asserted that the evidence fails to establish any actionable negligence on the part of defendant. A careful examination of the record convinces us that this contention is sound.

Plaintiff was engaged in the tire-repair business and, as lessee, occupied a building at 2302 Cuming street in the city of Omaha. On June 16, 1928, a heavy rain occurred, more than two inches of water falling in an hour. The water from the street overflowed the curb and filled the basement of plaintiff's premises, causing considerable damage to his merchandise therein kept.

While several grounds of negligence are alleged in the petition, plaintiff frankly admits that he relies upon the fact that the storm sewer was insufficient in capacity to carry off the surface water, and this forms the basis of his right to recover. Plaintiff cites and relies upon a number of cases wherein storm sewers of insufficient capacity were

knowingly maintained by municipalities, and where the sewage backed up through the sewer into the basements of buildings, and thereby caused damage, but those cases are not in point and have no application to the situation presented by the record in this case. In the instant case, the water never reached the sewer. There was no backing up of water through the sewer connections. Plaintiff's injury was sustained solely by surface water that overflowed into his building and basement. There is no evidence that any act of the defendant caused the surface water to accumulate and be thrown upon his premises. For aught that appears, no more water came to or upon plaintiff's premises than would have naturally reached them if no sewer had been constructed. In fact, the inference is that less water was precipitated upon his premises than would have been, had no sewer been constructed. The law authorizes, but does not require, cities of the metropolitan class to construct storm sewers. If no storm sewer had been constructed, plaintiff's damage would not have been less and might have been greater. Plaintiff's plight is no worse because of the insufficiency of the sewer, and it is to be inferred that it is somewhat better.

A somewhat similar question was presented in *City of Atchison v. Challiss*, 9 Kan. 603, 611, where in the opinion it was said: "Now, if a city is not bound to construct a drain of any kind, by what system of reasoning can it be made to appear that if it shall construct a drain it must construct one that shall be sufficient in all cases, and for every emergency? Any drain is better than no drain. Any drain instead of being an injury to a party is, so far as it operates, a positive benefit. If it carries off half the water that falls upon his premises, instead of the whole, how can that be said to be an injury? Is it not an actual benefit to the extent that it operates? And if a benefit, upon what principle can the city be made liable?" If failure to construct storm sewers to carry off any of the surface waters was not negligence, certainly the construction of the sewer that carries away a part of the water would not be actionable.

The evidence fails to establish any actionable negligence on the part of defendant. It follows that the findings and judgment of the district court are erroneous.

The judgment is reversed and the cause remanded for further proceedings.

REVERSED.

LILLIE LONG ET AL., APPELLANTS, V. EMMA V. OSBORN, APPELLEE.

FILED MAY 9, 1930. No. 27230.

Specific Performance: PETITION. In an action for specific performance of a contract for the sale and purchase of real estate, evidenced by written communications, where the petition reflects a contract definite and certain in its terms, and that such contract was entered into with perfect fairness and with common intent, and reveals a sufficient note or memorandum evidencing the contract, signed by the vendor, to satisfy the statute of frauds, and also discloses compliance on the part of plaintiff and refusal to comply on the part of defendant, and where the different communications are each and all set forth in such petition and are properly connected with each other and with the parties and the lands in suit, by necessary innuendoes and amplifications, such petition is invulnerable to a general demurrer.

APPEAL from the district court for Burt county: WILLIAM G. HASTINGS, JUDGE. *Reversed.*

Orville Chatt, J. A. Singhaus and *Howell, Tunison & Joyner,* for appellants.

W. M. Hopewell and *A. N. Corbin, contra.*

Heard before GOSS, C. J., DEAN, GOOD, THOMPSON and DAY, JJ., and JAMES and WRIGHT, District Judges.

THOMPSON, J.

This is an action for specific performance of a claimed contract, evidenced by written communications, for the sale and purchase of real estate in Burt county, instituted by appellants, hereinafter called plaintiffs, against appel-

lee, hereinafter designated defendant. A general demurrer was interposed by defendant to the plaintiffs' second amended petition, which was sustained, and plaintiffs electing not to plead further, judgment of dismissal was entered. Plaintiffs appeal.

Thus, there is submitted for our determination: Did the second amended petition state facts sufficient to constitute a cause of action?

The record reflects the following material facts, among others: William Hayes died testate July 23, 1927, a resident of Burt county, Nebraska, at which time and prior thereto he was the owner of the south half of the northwest quarter of section 22, township 20, range 9, in such county. By his claimed last will and testament, in writing, he devised this land to defendant, one of his nieces, subject to a life estate therein of May L. Valentine. The will was offered for probate, and on August 17, 1927, plaintiffs herein, who were also nieces and nephews of testator, filed objections to the admission of the above purported will to probate, and as ground therefor interposed the challenge that Hayes was not of sufficient mental capacity to make a will. This question coming on to be heard on September 19, 1927, the objections were overruled, and the will admitted to probate. To reverse this judgment the contestants appealed to the district court, where the matter rested until on the 19th day of May, 1928, when such appeal was by them dismissed. This left the judgment of the county court in full force and effect. Due administration of the estate was had. Thus, ever after the entry of the original judgment in the county court, the defendant was the owner in fee of the lands in question (subject to the aforesaid life estate) and owned no other lands in this state. Between the time of the rendition of the judgment in the county court and the dismissal of the appeal in the district court, the defendant and the plaintiffs herein, being each and all desirous of making an amicable and final adjustment of the matters involved, entered into the negotiations reflected by the written communications hereinbefore referred to. To copy such communications (con-

sisting of letters, deeds, drafts, and a telegram) would serve no useful purpose. Hence, it is deemed sufficient to say that, after a careful examination of these communications, we conclude that they evidence a definite offer by defendant to sell the lands hereinbefore described to the plaintiffs, for the sum of $3,000, and a definite acceptance of such offer by them. On this acceptance the contract, as between the parties, became binding and enforceable. However, it is uged by the defendant that such communications show that thereafter, as her husband had strong opposition to a settlement, she decided to withdraw her offer and call the deal off, and had so notified the plaintiffs. As to this, it may be stated that such desired abandonment was neither accepted nor approved by the plaintiffs, and, as there was no consideration for the same, it was without force or effect.

It is our conclusion that the amended petition reflects a contract definite and certain in its terms, and that such contract was entered into with perfect fairness and with common intent; that such petition discloses a sufficient note or memorandum evidencing the contract, signed by the vendor, to satisfy the statute of frauds (Comp. St. 1922, sec. 2453), and shows compliance on the part of plaintiffs and refusal to comply on the part of defendant. Further, the different communications were each and all set forth in the petition, and were also properly connected with each other, and with the parties and the lands in suit, by necessary innuendoes and amplifications. The question here involved coming to us buttressed on a demurrer to the petition, fraud or misunderstanding does not enter therein, unless apparent in the petition itself, which we find it is not.

It follows that the amended petition contains facts sufficient to constitute a cause of action, and therefore the trial court erred in sustaining the demurrer and dismissing the suit.

The judgment is reversed and the cause remanded for further proceedings, with leave to the defendant to answer.

REVERSED.

IN RE APPLICATION OF JOSEPH S. FLANDERS FOR WRIT OF HABEAS CORPUS.

JOSEPH S. FLANDERS, APPELLANT, V. E. C. KAVANAUGH, SHERIFF, APPELLEE.

FILED MAY 9, 1930. No. 27278.

Information: SUFFICIENCY: ASSAULT AND BATTERY. Where, as in this case, the information charges one with an assault with an intent to kill or wound, and that he shot another with a pistol, it includes and charges an unlawful assault and battery with the minuteness necessary to sustain a conviction of the lesser crime.

APPEAL from the district court for Platte county: LOUIS LIGHTNER, JUDGE. *Affirmed.*

Wagner & Wagner, for appellant.

Emil F. Luckey, contra.

Heard before GOSS, C. J., ROSE, GOOD, THOMPSON, EBERLY and DAY, JJ., and THOMSEN, District Judge.

DAY, J.

Joseph S. Flanders was found guilty of assault and battery. He seeks a writ of habeas corpus and appeals from the order of the trial court denying it. The information upon which Flanders was tried charges that he unlawfully, feloniously and maliciously made an assault upon one with a certain pistol and shot him with intent to kill or wound. Does the information include and charge a simple assault and battery?

To charge a statutory offense, the information must contain a distinct allegation of each essential element of the crime as defined by the law creating it, either in the language of the statute, or its equivalent. *Nichols v. State,* 109 Neb. 335; cited with approval in *Morris v. State,* 109 Neb. 412, and *Barton v. State,* 111 Neb. 673. The general rule is that on an indictment for an offense, where some of its essential elements constitute a lesser crime, the information may include and charge the lesser offense. But the appellant contends that the holding of the court in *Tasich v.*

State, 110 Neb. 709, is controlling here. In that case we said that, under an information charging defendant with shooting another person with intent to kill, such defendant cannot be convicted of an assault with intent to do great bodily harm, because the section of the statute defined several distinct independent offenses of equal rank, no one of which is embraced within the other. This rule is not controlling of the instant case, since assault and battery is not an independent substantive crime of equal rank with shooting with intent to kill or wound. It is a lesser crime, and may be included and charged in the information for the greater offense.

The information in this case charges the essential elements of the crime of assault and battery. "An indictment alleging an assault of such a character as would support a charge of assault with intent to kill with a wooden club, if it described the club as a deadly weapon, will, when those terms are omitted, support a conviction for assault and battery." *Kruger v. State,* 1 Neb. 365. *Mulloy v. State,* 58 Neb. 204, holds that an information charging assault with intent to commit great bodily injury will sustain a conviction for assault and battery.

We are not unmindful that this court has held in *Morgan v. State,* 51 Neb. 672, that a count in an information charging killing in perpetration of a rape upon the person of deceased charges murder in the first degree, and does not include the lesser offenses of second degree murder and manslaughter. In *Rhea v. State,* 63 Neb. 461, we examined *Morgan v. State, supra,* and adhered to it. Likewise, in *Thompson v. State,* 106 Neb. 395, a charge of homicide committed in the perpetration of a robbery charges only murder in the first degree. The rule in these foregoing cases is grounded upon the fact that the turpitude of the act is in these exceptional cases made by statute to supply the place of deliberate and premeditated malice, while a purpose to kill is conclusively presumed from the intention which is the essence of the enumerated felonies. For a full and complete analysis of these cases, see *Davis v.*

State, 116 Neb. 90. In the *Davis* case, defendant was charged with homicide by administration of poison. The trial court in that case refused by its instructions to submit to the jury for their consideration the question of defendant's guilt of the lesser offenses. The general rule given in that case is: "Such an instruction is proper only when applicable to the evidence and where the evidence would justify a verdict of guilty of the lesser offense. If the evidence is such as to warrant only a verdict of the greater offense, or one of not guilty, then it is not proper to give such an instruction."

While there are cases *contra,* notably *State v. Foster,* 150 La. 971, it is generally held that an indictment for assault with intent to kill includes the offense of assault and battery. 31 C. J. 862. Where, as in this case, the information charges one with an assault with an intent to kill or wound, and that he shot another with a pistol, it includes and charges an unlawful assault with the minuteness necessary to sustain a conviction of the lesser crime of assault and battery. It therefore follows that the judgment of the trial court should be, and is,

AFFIRMED.

STATE, EX REL. O. S. SPILLMAN, ATTORNEY GENERAL, V. DUNBAR STATE BANK ET AL., APPELLANTS: JOHN T. MEAD, INTERVENER, APPELLEE.

FILED MAY 9, 1930. No. 26942.

Banks and Banking: GUARANTY FUND: DEPOSIT. Where the officers of a bank sell liberty bonds left with it for safe-keeping and convert the proceeds, substituting therefor certificates of deposit without the owner's knowledge or authority; *held,* that where the evidence does not establish that the proceeds of the sale, the money or its equivalent were in intention and effect placed in or at the command of the bank, a deposit is not created within the protection of the depositors' guaranty fund.

APPEAL from the district court for Otoe county: JAMES T. BEGLEY, JUDGE. *Reversed, with directions.*

C. M. Skiles, I. D. Beynon and *Albert S. Johnston,* for appellants.

Thomas E. Dunbar, contra.

Heard before GOSS, C. J., DEAN, GOOD, THOMPSON, EBERLY and DAY, JJ., and DINEEN, District Judge.

DINEEN, District Judge.

This case arises out of the failure of the Dunbar State Bank of Dunbar, Nebraska. Intervener John T. Mead purchased through the defendant Dunbar State Bank, then solvent, liberty bonds in the principal sum of $1,700. These bonds were left at the bank for safe-keeping; and on July 5, 1928, the bank being then insolvent, intervener immediately called at the defendant bank for his bonds, and was informed by Mr. Eiser, special agent for the guaranty fund commission for the state of Nebraska, that the bonds had been sold some time prior by Mr. Murray, the absconded president of defendant bank, and in lieu thereof there were on deposit in defendant bank certificates of deposit for $1,200 and $500 signed by Thomas Murray, president, and dated January 13, 1927. Being so advised, intervener Mead filed his claim with the receiver for defendant bank, based upon said two certificates of defendant bank. The trial court found that the intervener Mead's claim was preferred and was payable out of the depositor's guaranty fund.

The question to be determined in this case is: Was the deposit a good faith deposit within the meaning of the depositor's guaranty law? The bonds were left at the bank and without the knowledge or consent of the intervener were disposed of by an official of the bank. To presume that under the circumstances it was the intent of the intervener to make a general deposit within the meaning of the depositor's guaranty fund we think is too remote. We said in the case of *State v. Clinton State Bank,* 116 Neb. 482:

"Where certain liberty bonds were purchased by a bank for a customer, but were never delivered to the customer,

being left with the bank for safe-keeping, and were subsequently sold by the bank without the consent of the customer, neither the bonds nor their proceeds constituted a deposit within the protection of the state guaranty fund."

In the case at bar, however, certificates of deposit were issued to intervener but retained by the bank, and intervener had no knowledge of the issuance of the certificates until he called for his bonds, about July 5, 1928, at which time the bank was insolvent. While it may be proper to infer that the said certificates were issued as of the date they bear, January 13, 1927, there is no evidence in the record to show when the intervener's bonds were converted by the bank, nor is there evidence sufficient to establish the fact that, when said certificates were issued, in lieu thereof the money or its equivalent was in effect placed in or at the command of the bank, as was necessary under the holding of this court in *State v. Farmers State Bank,* 111 Neb. 117, as follows: "In order to create a deposit which will be protected by the guaranty law, as the term 'deposit' is understood in section 8033, Comp. St. 1922, it is necessary that money or its equivalent shall in intention and effect be placed in or at the command of the bank under circumstances which do not transgress specific limitations of the bank guaranty law."

It therefore follows that the judgment should be reversed and the cause remanded, with instructions to enter a decree in conformance with this opinion.

REVERSED.

HERBERT LEWIS, JR., APPELLEE, V. LOUIS H. MILLER, APPELLANT.

FILED MAY 16, 1930. No. 27119.

1. **Appeal:** INSTRUCTIONS. The court should submit only such issues to the jury as find some support in the evidence, but where an issue, without support in the evidence, is submitted and it clearly appears that the jury were not misled thereby, to the prejudice of the complaining party, reversible error cannot be predicated thereon.

2. **Instructions** complained of, given and refused, examined, and *held*, the court committed no error in the giving or refusal of same.
3. **Witnesses**: COMPETENCY: SPEED OF AUTOMOBILE. A witness who has shown himself qualified to give an opinion as to the speed of a moving automobile may express an opinion as to the speed a car is moving, although the same be coming directly toward him, such fact not affecting the competency of his testimony but rather the weight to be given the same.
4. ———: IMPEACHMENT. Where a party claims to have been misled or surprised by testimony of a witness called by him, it rests in the discretion of the court as to whether such party may be allowed to contradict the testimony of such witness by the introduction of alleged contradictory or variant statements previously made by the witness to such party or his counsel; and, unless it appears from the record that there is an abuse of such discretion, reversible error is not committed. *Held*, under the foregoing rule and the facts and circumstances disclosed in the record, no abuse of discretion appears in the refusal of the trial court to receive in evidence certain written statements made by witnesses for defendant and offered by him, as tending to contradict testimony given by such witnesses when called as his witnesses.
5. **Damages**. The judgment on the verdict of the jury for the amount of plaintiff's damages, as reduced by remittitur ordered by the trial court, sustained.

APPEAL from the district court for Douglas county: CHARLES LESLIE, JUDGE. *Affirmed.*

Crofoot, Fraser, Connolly & Stryker and *James T. English*, for appellant.

Leon & White, contra.

Heard before GOSS, C. J., DEAN, GOOD, THOMPSON and DAY, JJ., and FITZGERALD and LOVEL S. HASTINGS, District Judges.

HASTINGS, District Judge.

This is an action by Herbert Lewis, Jr., a minor, nineteen years of age, by his father as next friend, to recover damages on account of injuries received in an automobile collision between an automobile in which plaintiff, appellee, was riding as a passenger and an automobile owned and

driven by defendant, appellant, Louis H. Miller. The jury returned a verdict in favor of plaintiff in the sum of $5,500. A remittitur was ordered by the trial court of $1,500. The remittitur was made and judgment was entered for $4,000. Defendant appeals therefrom, and plaintiff prosecutes a cross-appeal to restore the $1,500 ordered remitted.

One of the principal grounds of error urged by counsel for defendant is the giving of instructions Nos. 1 and 4 by the trial court upon its own motion. Instruction No. 1 complained of sets out five acts of negligence alleged by plaintiff in his petition. By instruction No. 4 the jury were instructed that it was necessary for the plaintiff, before he could recover, to establish by a preponderance of the evidence that negligence on the part of the defendant in some one or more of the particulars set forth in plaintiff's petition, or that the negligence on the part of the defendant in some one or more of the particulars set forth in plaintiff's petition concurring with the negligence on the part of the driver of the automobile in which the plaintiff was riding at the time of the collision, was the proximate cause of the collision between said automobiles.

The particular complaint made against these instructions is that the trial court submitted certain alleged acts of negligence on the part of the defendant which found no support in the evidence. The particular acts of negligence complained of, submitted by said instructions, are:

"That the defendant's view of vehicles was obstructed by reason of the fact that there were three other occupants besides himself in his automobile, making it impossible for defendant to see approaching automobiles coming from the south toward the north."

"That the defendant's automobile was equipped with defective brake lining and braking appliances at the time of said collision."

A proper consideration of this question and other alleged errors requires an examination of the evidence. There is little conflict in the evidence. The collision complained of occurred on the 24th day of June, 1928, at about 7:30 p. m., on Pacific street a short distance west of the private drive-

way leading from the grounds of the Highland Country Club in Douglas county. Pacific street, on which the collision occurred, is a graveled highway 34.5 feet in width from shoulder to shoulder and runs east and west. The driveway from the club grounds intersects Pacific street nearly at right angles, and is about 40 feet in width at the intersection. West of the north end of the driveway, on Pacific street, there rises a hill, the top or crest being 300 feet west of the intersection. The hill in question obstructs the view from the east beyond the crest. From the top of the hill there is a decline to the north end of the driveway. From the north end of the driveway, where the same connects with Pacific street, there is a clear view westward to the top of the hill, and also a clear view along said street eastward from the top of the hill to where the driveway connects therewith. There was some shrubbery along the west side of said driveway which extended nearly to the intersection, which, to some extent, obscured the view of said driveway from persons coming east along Pacific street. However, an automobile might be seen, by those traveling eastward along Pacific street, as it emerged from the driveway and before entering upon Pacific street. The automobile in which plaintiff was riding was a Chevrolet coach occupied by five persons. The plaintiff occupied the front seat with one Boyer, the driver of the car; the other three persons occupied the back seat. The defendant, at the time of the collision, was driving an Oldsmobile coupé, occupied by three persons other than defendant; one of the persons being seated upon the lap of another. The car in which plaintiff was a passenger traveled north from the club house and, at a point where a clear view might be had of Pacific street to the east and to the west, the car was stopped and the driver of the car and a passenger, Linwood Hall, looked both to the east and west to ascertain if there was any vehicle upon the street that might interfere with entering upon said street. Seeing none the driver of the car put the car in first gear and proceeded to enter upon said street, driving the car to the north at a speed of about five or six miles an hour. When in about the mid-

dle of the street, the driver and one Hall, an occupant of the car, looked to the westward and saw the automobile of defendant coming over the top of the hill. The plaintiff did not see the car driven by defendant until it was about 150 feet from them. The car in which plaintiff was riding proceeded very slowly from that point in a northwesterly direction on the north side of the center of the street, and at the time of the collision was almost stopped. When the car driven by defendant was first observed it was north of the center of the street and it remained upon the wrong side of said street until a very short distance from the other automobile, when it swerved further to the left and then back to the right, striking the car in which plaintiff was riding upon the left side near the door and shoving it about 35 feet to the east and a little to the north into the ditch on the north side of the street. The evidence on behalf of plaintiff is that defendant's car was being driven at an estimated speed of from 50 to 60 miles an hour at and just prior to the collision. Defendant estimated the speed of his car at the top of the hill as from 35 to 40 miles an hour, and says that he did not slacken his speed or retard his motor up to the point of the collision, although he was going down grade and his speed must have increased on account thereof. He also testified that, from the top of the hill to a point about 50 or 75 feet west of where the collision took place, he traveled partly to the north of the center of the street and at that point his attention was called to the other car, which, he says, he had not seen before on account of his looking down at the road. He says that when his attention was called to the other car it was about in the middle of the street and moving slowly; that he attempted to apply his brakes and go around in front of the car by going further north and, realizing he could not do so, he turned his car to the right and the collision took place; that when the collision took place the other car was headed in a northwesterly direction and the left front part of his car struck the other about the middle of the left side. The evidence further discloses that immediately following the collision the defendant told a man that his

"brakes would not hold," and that some five months after the accident the defendant told another "if his brakes had been in good condition the accident would never have happened." The defendant does not deny he made such statements. The foregoing admissions of defendant, coupled with the fact that when he applied his brakes the speed of his car was not slackened or retarded thereby, warranted the jury in finding the braking appliances on his car must have been defective.

The case of *Yarbrough v. Carlson,* 102 Or. 422, is directly in point upon the question presented. In that case plaintiff introduced evidence to show the speed at which defendant was driving both before and at the time of the collision; the manner of his operation of the car at the time; the distance that plaintiff was dragged or propelled along the street before defendant stopped, also that after the collision defendant stated that he had defective brakes and could not avoid the collision. The defendant in that case requested the court to direct the jury that the plaintiff failed to introduce any competent evidence to prove that the brakes on his automobile were defective. This was refused and the court held:

"In an action for injury from a collision with an automobile, in which plaintiff alleged that defendant's automobile was equipped with weak and defective brakes, evidence held sufficient for the jury."

The evidence in this case justified the submission of the allegation of negligence that the brakes on the defendant's car were defective.

There is no evidence from which it might be inferred that defendant's view was obstructed by reason of there being three other occupants beside himself in his automobile so that in driving east he could not see cars coming from the south out of the private driveway. This particular claim of negligence on the part of the defendant should not have been submitted to the jury. The rule is:

"In stating the issues of fact in its charge to the jury, the court should submit to the jury only such issues as are presented by the pleadings and are in controversy, and

which find some support in the evidence." *Koehn v. City of Hastings,* 114 Neb. 106.

The submission of this act of alleged negligence could not operate to the prejudice of the defendant, unless it can be said, from a consideration of all the evidence, it might have misled the jury, and induced them to return a verdict that, otherwise, they would not have returned. The evidence is ample to warrant the finding that defendant was guilty of the other negligent acts alleged in the petition and submitted to the jury for its consideration, and that one or more of such negligent acts which, alone or concurring with negligence of the driver of the car in which plaintiff was riding, was the proximate cause of the collision and consequent injury to plaintiff. Under the evidence the jury would not have been justified in finding otherwise. Plaintiff was a passenger in the car in which he was riding. He had nothing to do with its operation or control, and there is no evidence upon which the jury could find that he was guilty of contributory negligence. Under the evidence in this case, the submission of the act of alleged negligence complained of could not have misled the jury to the prejudice of the defendant.

The refusal to give instructions Nos. 1 and 3 requested by defendant is assigned as error. Instruction No. 1 relates to the duty of a driver of an automobile entering a public highway from a private driveway. The requested instruction was fully covered by instructions given by the court upon its own motion.

Instruction No. 3, requested and refused, was to the effect that, if the jury believed from the evidence that the accident in question and the resulting damage to plaintiff was caused solely by the negligence of the driver of the car in which plaintiff was riding, he could not recover. The requested instruction was not supported by the evidence. The evidence would not have warranted the jury in finding that the accident in question was caused solely by the negligence of the driver of the car in which plaintiff was riding. Error was not committed in the refusal to give the instructions requested by defendant.

It is urged by counsel for the defendant that it was error to permit two witnesses for the plaintiff to testify as to the speed of defendant's automobile just prior to the time of the collision, as it was coming directly toward them, and they had no opportunity to compare its speed with objects which it was passing. Counsel cite no authority in support of their contention. The witnesses were the driver of the car in which plaintiff was riding at the time of the collision and Linwood Hall, a passenger in the car at that time. Both testified that they had driven cars for several years, had occasion to note the speed of different cars, either passing or coming toward them, and that they were able to estimate the speed of the automobile driven by the defendant. It further appears from the evidence that the two witnesses were familiar with the street in question and had driven over it in going to and from their work at the country club; that they first saw defendant's automobile as it came over the top of the hill, and observed its speed from then until the collision. They were permitted to give their opinion as to the speed of the automobile when about 100 feet away from them, and they testified that its speed was, at that time, between 50 and 60 miles an hour, and that it did not slacken its speed up to the time of the collision. It is the rule in this state that:

"A witness who sees a moving car, and possesses a knowledge of time and distance, is competent to express an opinion as to the rate of speed at which the car was moving." *Omaha Street R. Co. v. Larson*, 70 Neb. 591; *Pierce v. Lincoln Traction Co.*, 92 Neb. 797; *Andersen v. Omaha & C. B. Street R. Co.*, 116 Neb. 487.

The witnesses were qualified to give their opinion or estimate as to the speed at which defendant's automobile was driven just prior to the collision. The fact that the automobile driven by defendant was coming toward them affected the weight rather than the competency of their testimony. The weight to be given their testimony upon this subject, under all the circumstances proved, was for the jury. *Pierce v. Lincoln Traction Co.*, 92 Neb. 797. See 42 C. J. 1225, sec. 1026; *Owens v. Iowa County*, 186 Ia. 408.

Complaint is made that defendant was not permitted, on cross-examination, to ask the plaintiff in reference to a certain unsigned written statement claimed to have been made to Mr. English, one of the attorneys for the defendant, some 19 days after the accident. A certain part of said statement was read to the witness on cross-examination and the inquiry made as to whether or not he had made such a statement to Mr. English. The trial court suggested the better way would be to show the witness the statement and ask him whether he made the statement and, possibly, offer the statement itself. The defendant then proceeded with the cross-examination of the witness and cross-examined him at length as to whether or not he made certain statements to Mr. English in regard to the accident. The witness was permitted to answer all of such questions and this line of cross-examination was pursued as far as seemed to be desired by counsel for the defendant. An examination of the record shows that the claim of error in this respect is without merit.

Error is claimed on account of a ruling made by the trial court sustaining an objection to the offer of a certain written statement signed by Mrs. Mary Ziskovsky, a passenger in the car of the defendant Miller at the time of the accident. It seems that five days after the accident and while Mrs. Ziskovsky was still in the hospital, in pain, with face cut and her tongue almost severed, Mr. English, one of the attorneys for the defendant and the insurance company, in which defendant carried liability insurance, called on her at the hospital and asked her about the accident. He wrote the statement in his own language. After he had written the statement it was not read by the witness nor does she remember that he read all of it to her. The defendant called her as a witness in his own behalf, inquired of her as to her knowledge of the speed of the defendant's car at the time and tried to qualify her so that she might give an estimate of its speed just before the collision. She was unable to qualify, and was not asked to give her estimate of such speed. It also appears that at the time Mrs. Ziskovsky had a suit pending against the

defendant growing out of the same accident. In the statement offered, Mrs. Ziskovsky is made to say that she judges that the defendant's car was going at 25 miles an hour. There is nothing in the statement that shows that she was qualified to give an estimate of the speed at which the car was traveling. The statement is also replete with conclusions, such as: "Mr. Miller (the defendant) was driving in a careful manner." Also, in speaking of the time that the car of plaintiff came out of the private driveway: "We were so close to it at the time that it was impossible for Mr. Miller to avoid hitting it." Also: "I think that the cause of this accident was the sudden appearance of the Chevrolet car in our path at a time when it was impossible to avoid running into it." Counsel contends that, since the witness was hostile, the defendant was entitled to have her statement admitted in evidence as contradictory of some of her testimony given when called as a witness on behalf of the defendant, and cites *Penhansky v. Drake Realty Construction Co.*, 109 Neb. 120, in support of his contention. In that case this court held:

"Where one has been misled or entrapped into calling a witness by reason of such witness, previous to the trial, having made statements to the party, or his counsel, favorable to the party's contention, and at variance with the testimony given at the trial, and the party believed and relied upon such statements in calling the witness, and is surprised by the testimony on a material point, he may, in the discretion of the court, be permitted to show the contradictory statements made before the trial."

Under the rule announced in that case, when a party calls a witness and is surprised or misled by the testimony of the witness on a material point, it rests in the discretion of the court as to whether he will be permitted to show the contradictory statements made before the trial. As we have pointed out, aside from the conclusions contained in the statement, there is very little in the statement that might be deemed contradictory of the testimony given by the witness when testifying in behalf of the defendant. The conclusions contained in the statement would not have been

admissible in behalf of the defendant had she been a friendly and willing witness and attempted to testify thereto when called as a witness by him. No offer was made of the parts of the statement that purport to state facts and not conclusions. Taking into consideration the time and the circumstances under which the alleged contradictory statements were made, that it was entirely written by the attorney for the defendant and the insurance company, and consisted largely of conclusions and not statements of fact, there was no abuse of discretion on the part of the trial court in sustaining an objection to its admission in evidence.

Counsel for defendant also claim error in the sustaining of objections to the admission of a written statement made by Joe Ziskovsky a short time after the happening of the accident. The statement was taken by the same attorney who took Mrs. Ziskovsky's statement. It appears that Mr. Ziskovsky was a passenger in the car of the defendant at the time of the accident; that he had assigned his claim for damages to his wife, who brought suit against the defendant to recover damages for herself and for damages alleged to have been sustained by him. The defendant called Mr. Ziskovsky as a witness in his own behalf. He was examined at length and he was unable to qualify so as to testify to the speed of defendant's car at or about the time of the accident, nor was he asked to give his opinion as to such speed. The statement offered in evidence contains very little that is contradictory of the testimony of the witness when testifying in behalf of defendant. The only part of such statement that seems to be in any way contradictory of his testimony upon a material point is where he says that before the collision the defendant was driving "on the right-hand side of the road." The record shows that, after the court excluded the entire statement, a portion of the statement was offered and received in evidence. The part of the statement received in evidence was: "Joe Ziskovsky. July 1, 1928, we were returning home on the Pacific street road past the Highland Country Club grounds. We were going east on the right-

hand side of the road." There was no abuse of discretion on the part of the trial court in excluding the remainder of the statement.

It is contended by counsel for defendant that the verdict of $5,500 is so excessive it indicates that it was the result of passion and prejudice. The evidence shows that the plaintiff received severe and permanent injuries to his right hand. He had six tendons cut on the front and inner side of his wrist, also the ulnar nerve and four tendons cut on the back side of the wrist. Plaintiff was on the operating table for two and a half hours while the tendons and the ulnar nerve were sutured. The evidence of the doctor who treated him is that, due to both the severence of the ligaments and the nerve, there is no doubt but that there will be a permanent disability of the hand and wrist. The plaintiff also suffered contusions and bruises over his face and left ear and arm. Plaintiff at the time of the trial was suffering from a paralysis of two fingers of the right hand and had no sensation or feeling in the ulnar side of the ring finger. There is no doubt but what plaintiff suffered considerable pain from his injuries.

The plaintiff, on his cross-appeal, claims that the amount found by the jury should be restored and judgment given him for that amount. From a careful consideration of the evidence in relation to his injuries we do not believe that the verdict of the jury was so excessive as to indicate that it was the result of passion and prejudice. It is not contended by defendant that the amount as fixed by the trial court of $4,000 is excessive and we believe that the judgment for that amount as entered by the trial court should not be interfered with.

The judgment of the trial court should be and is hereby AFFIRMED.

O. E. LOWELL, APPELLANT, V. BUFFALO COUNTY, APPELLEE.

FILED MAY 23, 1930. No. 27057.

1. **Eminent Domain: DAMAGE TO PROPERTY.** The constitutional provision forbidding the taking or damaging of private property

for public use without just compensation applies to special damages to land by the vacating of a public highway.

2. ———: ———. The words "or damaged" as used in the constitutional provision forbidding the damaging of private property for public use without just compensation include all damages thus causing a diminution in the value of such property.

3. ———: ———. The law provides for the ascertainment and payment of special damages to private property by the vacating of a public highway.

4. ———: ———: APPEAL. An appeal to the district court from an award of special damages to private property, caused by the vacating of a public highway, is authorized by law.

5. **Highways:** VACATING: DAMAGES. Upon appeal from an award of damages caused by the vacating of a public highway, the compensation to which claimant is entitled must be ascertained "in the same manner as in actions by ordinary proceedings." Comp. St. 1922, sec. 2603.

6. **Eminent Domain:** DAMAGE TO PROPERTY. Neither Constitution nor statute excepts from just compensation for special damages to private property by the vacating of a public highway any loss or injury that reduces its value, special benefits considered.

7. ———: ———. A landowner cannot ordinarily recover, on account of a lawful public improvement, damages that he suffers in common with the public generally, though his loss may be greater in degree, but this rule does not prevent the recovery of special damages.

8. ———: ———: MEASURE OF DAMAGES. Where private property has been taken or damaged by the vacating of a public highway, the owner, if suffering special damages, is entitled to recover the difference between its value immediately before and immediately after the change.

9. ———:———. Where a public highway, intersecting an improved farm and extending to markets in both directions, is vacated, leaving the landowner with only one outlet from a *cul-de-sac*, he may thus suffer special damages not common to the community at large.

10. ———: ———: MEASURE OF DAMAGES. Whatever reduces the market value of real estate by the injuring of it for public use may be considered in determining the just compensation to which the property owner is entitled, where he suffers damages not common to the public generally.

11. ———: ———. Where the owner of real estate is entitled to recover special damages, on the ground that it was depreciated in value by the vacating of a public highway intersecting it, the jury, in determining his just compensation, may consider resulting diversion of travel and removal of a mail box and a

schoolhouse, not as independent items of damage, but for the purpose of determining the market value of the property before and after the vacating of the highway.

APPEAL from the district court for Buffalo county: BRUNO O. HOSTETLER, JUDGE. *Reversed.*

Nye & Nye, for appellant.

E. G. Reed, contra.

Heard before GOSS, C. J., ROSE, DEAN, GOOD, THOMPSON and DAY, JJ., and THOMSEN, District Judge.

ROSE, J.

This is a proceeding to recover from Buffalo county $5,000 in damages alleged to have been caused by the vacating of a public highway running north and south through a 200-acre island farm owned by plaintiff. Extending northeast and southwest, his land is an irregular tract approximately half a mile wide between two channels of the Platte river. A modern house occupied by him and his family is situated near the east end of his farm. In front of his residence the county maintained for many years a public highway running north and south, on which there was a bridge across the north channel a short distance north of his house and a bridge across the south channel 1,335 feet therefrom. By the old route it was approximately five miles to Gibbon on the north and about the same distance to Lowell on the south, towns thus formerly accessible to plaintiff for marketing and for other purposes. The county vacated this highway north and south of his land, abandoned both bridges and left him with a single outlet extending north 660 feet from his residence to a road running southwest along the south bank of the north channel of the Platte river a mile or more to a new graveled highway.

Plaintiff filed his claim with the county board, was awarded $125, and appealed to the district court.

The petition states a cause of action and contains in detail pleas that plaintiff's dwelling house and other farm

buildings are now on a blind road or *cul-de-sac;* that the distance to his public markets at Gibbon and Lowell is materially increased; that the former general traffic which created a market at his home for some of his farm products is diverted to other highways; that a former mail box and schoolhouse a few rods from his residence are more than a mile away; that these changes were caused by the changing of the highway; that the vacating of the old road decreased the value of his real estate to the extent of $5,000, for which he demands judgment.

The answer contains allegations to the effect that defendant opened, approximately three-fourths of a mile west of the property of plaintiff, between his markets at Gibbon and Lowell, a new highway which has been improved and graveled by the state; that the new highway is connected with his premises by a suitable, shorter road to his markets at Gibbon and Lowell; that the portion of his farm formerly occupied by the old road has been restored to him as a special benefit; that he has not been damaged by the change to any extent beyond $125, which defendant offers to pay. The answer contains also a general denial. Allegations of new matter in the answer were put in issue by a reply.

Upon a trial of the cause the jury rendered a verdict in favor of plaintiff for $125 only. From a judgment for that sum he has appealed.

By rulings on evidence and by instructions the trial court required the jury to disregard testimony tending to prove that the value of the farm was depreciated by the removal of the mail box and the schoolhouse and by the diversion of traffic. These rulings and instructions were properly challenged as erroneous and prejudicial. In respect to all damages recoverable the entire record is presented for review. The evidence shows without dispute that for many years a public highway extended north and south through plaintiff's farm and across both channels of the Platte river; that the action of the county board left his dwelling house on a blind road or *cul-de-sac;* that he has only one outlet; that by the present route it is more than

a mile from his farm buildings to the new traveled highway; that the distance to his markets is increased. There is also testimony tending to prove that, by the vacating of the old road and the creating of the *cul-de-sac,* plaintiff suffered damages not shared in common with the community at large; that the removal of the mail box and the schoolhouse and the diversion of traffic were necessary results of the changes and materially depreciated the market value of the farm.

The Constitution forbids the taking or damaging of private property for public use without just compensation. Const. art. I, sec. 21. The words "or damaged" as used in the section of the Constitution cited include all damages arising from the exercise of the right of eminent domain which cause a diminution in the value of private property. *City of Omaha v. Kramer,* 25 Neb. 489. The legislature made provision for the ascertainment and payment of damages to private property by the vacating of a public highway. Comp. St. 1922, sec. 2586. An appeal to the district court from an award of special damages to private property, caused by vacating of a public highway, is authorized by law. Comp. St. 1922, sec. 2600. Upon appeal from such an award the amount to which a landowner is entitled as a result of vacating a public highway through his premises must be ascertained "in the same manner as in actions by ordinary proceedings." Comp. St. 1922, sec. 2603. Neither Constitution nor statute excepts from just compensation for special damages to private property by the vacating of a public highway any loss or injury that reduces its value, special benefits considered. According to a familiar doctrine, a landowner cannot ordinarily recover, on account of a lawful public improvement, damages that he suffers in common with the public generally, though his loss may be greater in degree. *Enders v. Friday,* 78 Neb. 510; *Lee v. City of McCook,* 82 Neb. 26; *Van Valkenberg v. Rutherford,* 92 Neb. 803; *Burkley v. City of Omaha,* 102 Neb. 308. The opinions in these cases, however, do not justify the conclusion that special damages, not suffered by the community at large, cannot be recovered. *Lindsay*

v. Omaha, 30 Neb. 512; *Mason City & Ft. D. R. Co. v. Kennedy,* 113 C. C. A. 412; *Gillespie v. City of South Omaha,* 79 Neb. 441; *Kayser v. Chicago, B. & Q. R. Co.,* 88 Neb. 343; *Jones v. City of Aurora,* 97 Neb. 825. In Nebraska compensation for private property taken or damaged for public use is measured by the following rule:

"Where property has been taken or damaged for a public use, the owner is entitled to recover as compensation the difference between the value of such property immediately before and immediately after the completion of the improvement from which the injury results." *Chicago, R. I. & P. R. Co. v. O'Neill,* 58 Neb. 239.

In a recent case the supreme court of Minnesota ruled:

"The owner of property abutting on a public highway has a special interest in the highway different from that of the general public. To recover damages for the obstruction or vacation of the highway, it is not essential that access to his property has been entirely cut off, but he cannot recover if his only complaint is that he is compelled to travel farther or over a poorer road in going to and from his property. The owner of land to which a public highway extends and one whose land does not come in contact with the highway occupy different positions. If, by the discontinuance of a highway running across, along or to the land in question it is left abutting upon a *cul-de-sac,* the owner is deemed to have suffered an injury not common to the public." *In re Hull,* 163 Minn. 439, 49 A. L. R. 320, 325; followed in *Jones v. City of Aurora,* 97 Neb. 825.

A careful annotator who had collected the cases on the same point said:

"The weight of authority supports the proposition that if, by the vacation or closing of a street, access to property from the general system of streets in that direction (is cut off), and the property is left fronting on a *cul-de-sac,* the owner may recover damages." 49 A. L. R. 351, and cases cited in note. See 5 R. C. L. Perm. Supp. p. 3311; *Park City Yacht Club v. Bridgeport,* 85 Conn. 366, 39 L. R. A. n. s. 478; *City of Chicago v. Burcky,* 158 Ill. 103, 29 L. R. A. 568; *Bannon v. Rohmeiser,* 90 Ky. 48; *Vander-*

burgh v. City of Minneapolis, 98 Minn. 329, 6 L. R. A. n. s. 741; *Neudoefer Silcox Co. v. Marting Bros. Co.,* 17 Ohio App. 286.

In harmony with the weight of authority, the view recently taken by the supreme court of Nebraska is indicated by the following expression of opinion:

"In the instant case, the three lots are used as one tract, having common improvements, and, in assessing damages, must be treated as a single piece of property, abutting on the vacated portion of the streets. In closing these streets and placing plaintiff's property at the end of a pocket street, her damage is different from that of the general traveling public, and she suffered damage special and peculiar to this property, and different from that of the general public." *Jones v. City of Aurora,* 97 Neb. 825.

Whatever reduces the market value of real estate by the injuring of it for public use may be considered in determining the compensation to which the property owner is entitled, where he suffers damages not common to the public generally. Authority for this view is found in former opinions:

"The jury in fixing the damages sustained by a landowner in consequence of the appropriation, or injury, of his property for a public use may take into account every element of annoyance and disadvantage resulting from the improvement which would influence an intending purchaser's estimate of the market value of such property." *Chicago, R. I. & P. R. Co. v. O'Neill,* 58 Neb. 239; *Kayser v. Chicago, B. & Q. R. Co.,* 88 Neb. 343.

Where the owner of real estate is entitled to recover special damages, on the ground that it was depreciated in value by the vacating of a public highway intersecting it, he is entitled to the benefit of the following doctrine in connection with the general rule that the measure of damages is the difference between the value of the property immediately before and immediately after the making of the improvement:

"In determining the amount of such damages, the jury may consider diversion of travel, inconvenience of access,

and diminution of business carried on upon said property, not as independent items of damage, but for the purpose of determining the market value of the property before and after the construction of such improvement." *Gillespie v. City of South Omaha*, 79 Neb. 441.

It follows that the rulings of the trial court in requiring the jury, on the issue of value immediately before and immediately after the vacating of the highway, to disregard evidence relating to the diversion of traffic and to the removal of the mail box and the schoolhouse were erroneous to the prejudice of plaintiff.

The trial court also erred in omitting all material statements of the petition except one and in emphasizing every allegation of the answer, while instructing the jury; in reading to the jury from the answer of defendant an allegation of which there was no proof, without cautioning them that it should not be considered as evidence; in stating to the jury that the land of plaintiff is only three-fourths of a mile from the new highway, though the distance from his farm buildings is more than a mile by his only outlet; in giving credence to witnesses for defendant while examining them at length from the bench; in examining witnesses from the bench on elements of a defense not pleaded. It is not necessary to discuss these errors in detail since a new trial without the recurrence of them must be granted for the errors relating to evidence and instructions.

The judgment of the district court is therefore reversed and the cause is remanded for the purpose of ascertaining the amount of compensation to which plaintiff is entitled according to the statutory method—"the same manner as in actions by ordinary proceedings."

REVERSED.

VERUS SULLEY V. STATE OF NEBRASKA.

FILED MAY 23, 1930. No. 27293.

1. **Witnesses: EXAMINATION.** The statute providing that "a witness may be interrogated as to his previous conviction for a

felony" does not limit the inquiry to a single conviction or prevent a proper inquiry as to the number of his convictions.

2. ———: ———. Where a witness testifies in answer to a question on cross-examination that he had previously been convicted of a felony, the sustaining of an exception to another inquiry as to how many times he had been convicted of felonies is erroneous and reversible if shown to be prejudicial.

ERROR to the district court for Douglas county: JAMES M. FITZGERALD, JUDGE. *Reversed.*

R. T. Coffee and *Allen & Requartte*, for plaintiff in error.

C. A. Sorensen, Attorney General, and *Clifford L. Rein, contra.*

HEARD before ROSE, GOOD, THOMPSON, EBERLY and DAY, JJ.

ROSE, J.

In a prosecution by the state in the district court for Douglas county, Verus Sulley, defendant, was convicted of robbery, and for that felony was sentenced to serve a term of seven years in the penitentiary. As plaintiff in error defendant presents for review the record of his conviction.

The principal assignment of error is directed to the sustaining of an exception to a question propounded to the state's witness, Lee Flowers, on cross-examination. He was asked: "Have you ever been convicted of a felony?" His answer was: "I have." He was then asked: "How many times?" To this latter question an exception was sustained by the trial court. Whereupon defendant offered to prove that the witness was convicted of burglary in 1924; of burglary in 1925; of carrying concealed weapons in 1926; of the sale of narcotics in 1928. Did the law require an answer to the question calling for the number of times the witness had been convicted of felonies, after testifying he had once been convicted?

The information charged that, on August 4, 1929, Verus Sulley, defendant herein, and Harlan A. Schlagel violently, intentionally and feloniously assaulted Lee Flowers, put him in fear and robbed him of $85. Lee Flowers and his

wife testified that the robbery charged was committed in their home in Omaha at night and they identified Harlan A. Schlagel and Verus Sulley as the robbers.

Lee Flowers, the victim of the robbery as charged, was the state's witness who, after stating he had himself been convicted of a felony, was asked on cross-examination: "How many times?" In sustaining the objection thereto, did the trial court err? The purpose of defendant in asking the question was to discredit the witness, either by eliciting an affirmative answer or by record proof that he had been convicted of other felonies. In this connection it is argued by defendant that the right to make the initial inquiry as to a conviction for a single felony, if answered in the affirmative, includes similar inquiries about other convictions for felonies. It has long been recognized that a conviction for a felony may have a tendency to discredit the convict as a witness and it may fairly be inferred that additional convictions may affect his credibility still further. On the other hand, it is suggested by the state that the Nebraska statute relating to this subject, as construed by the supreme court, limits the inquiry to a conviction for a single felony. The statute is in this language:

"A witness may be interrogated as to his previous conviction for a felony. But no other proof of such conviction is competent except the record thereof." Comp. St. 1922, sec. 8848.

Referring to the section quoted, the following rule was announced in a recent case:

"Where a witness on cross-examination admits previous conviction of a felony, it is error to allow further inquiry on the subject or to permit the record of the conviction to be introduced." *Bosteder v. Duling*, 115 Neb. 557, following *Vanderpool v. State*, 115 Neb. 94.

In the latter case cited, the language is different, but the import is the same, as indicated by the following excerpt from the syllabus:

"A defendant in a criminal prosecution becoming a witness in his own behalf may be asked on cross-examination whether he has previously been convicted of a felony, and

if he answers in the affirmative further examination along that line should cease."

The expressions, "it is error to allow further inquiry on the subject," and "further examination along that line should cease," refer to the single conviction disclosed by the testimony of the witness and, in the connection used, those rulings do not preclude an inquiry as to the number of convictions for felonies. The statute quoted does not terminate the right of inquiry after the disclosure of one conviction. The legislative intention to permit one inquiry disclosing a conviction implies, for the same purpose, the right to ask if there were others. In a former opinion delivered by Judge Root the following view was expressed:

"The defendant complains because he was asked on cross-examination whether he had not been twice convicted of a felony. The witness admitted he had been convicted once, but evaded the question with respect to the second conviction, and finally said the second time he pleaded guilty. It then became necessary for the state to show that a judgment had been entered on that plea, else the prosecutor could not lawfully ask the jury to consider the defendant's testimony in the light of the fact that he had twice been convicted of a felony. *Marion v. State*, 16 Neb. 349, 360. But nine questions were asked upon this subject, and seven of them were made necessary by the defendant's equivocation. We find nothing in the record to indicate a departure from a correct rule of practice with respect to these questions." *Johns v. State*, 88 Neb. 145.

This is in harmony with opinions of other courts. *Dively v. People*, 74 Colo. 268; *State v. Newlin*, 84 Or. 323; *People v. Eldridge*, 147 Cal. 782. In the latter case the court said:

"Section 2051 of the Code of Civil Procedure, which permits proof of the fact that a witness has been convicted of a felony to be given for the purpose of impeaching him, places no limitation upon the number of felonies of which it may be shown he has been convicted, and considering the purpose of allowing the proof at all, it is obvious that no such limitation could have been intended."

Upon mature deliberation it seems clear that the trial court erred in preventing the witness Flowers from stating

how many times he had been convicted of felonies. Whether such an error requires a reversal of the sentence pronounced by the trial court, however, depends upon the peculiar condition of the record. Four witnesses only testified directly to facts relating to the charge that defendant committed the robbery, two on each side of the issue raised by the plea of not guilty. One witness, the principal one for the state, was the alleged victim of the robbery, who admitted he had himself been convicted of a felony, and the other was his wife. Both testified to details of the robbery and identified defendant as one of the robbers. Defendant testified in his own behalf that, at the time of the robbery, he was at the home of his mother in a different place and did not commit the robbery or participate in it. There was no evidence that defendant had ever before been convicted of a felony and there was additional proof of his alibi. The other witness who testified directly was Schlagel, who admitted he had been convicted of the identical felony charged and testified that defendant was not present at the robbery and had nothing to do with it and that another fellow whom he called "Bud" was with him. The conviction depended largely on the state's witness who admitted he had been convicted of a felony and who was prevented from stating how many times he had been convicted of felonies. Without holding that an error of this kind is prejudicial as a general rule, the conclusion is that a reversal herein is required under the peculiar conditions disclosed by the present record. The judgment of the district court is therefore reversed and the cause remanded for further proceedings.

REVERSED.

EDWIN B. HELLER, APPELLEE, V. HERMAN SPEIER, APPELLANT.

FILED MAY 23, 1930. No. 27085.

1. **Affirmance.** The evidence examined, discussed in the opinion, and *held* sufficient to sustain the verdict of the jury.
2. **Contracts: RESCISSION: BURDEN OF PROOF.** Rescission is an affirmative defense and a question of fact for the jury, the

burden of proving it by a preponderance of the evidence being upon the party pleading it.

3. ———: BREACH: MEASURE OF DAMAGES. The measure of damages for a breach of contract to repurchase corporate stock is the amount the seller has agreed to pay the buyer as the repurchase price.

4. Evidence: CORPORATE STOCK: MARKET VALUE. Where corporate stock is held almost entirely by the president of the corporation, members of his family and employees of the corporation, and not listed on any stock exchange or market and not freely bought and sold in the open market, financial statements of the corporation, prepared by an accountant employed by the corporation and forming part of the records of the same, showing the assets and liabilities of the corporation and acted upon by the corporation as correct statements of its financial condition, are receivable in evidence to show the market value of such stock.

5. ———: ———: ———. Testimony of witnesses familiar with the values of stocks and bonds generally and with their market values, knowing the reputation of the corporation, the nature of its business and the reputation the corporation bore to the stock buying community, and also testifying to the assets and liabilities of the corporation as shown by a financial statement of the corporation forming part of its records and acted upon by it as a correct statement of its financial condition, is competent as to their opinion of the market value of such stock.

APPEAL from the district court for Lancaster county: ELWOOD B. CHAPPELL, JUDGE. *Affirmed.*

Frank A. Peterson, Charles F. Adams, Claude S. Wilson, Roy F. Gilkeson and *Hymen Rosenberg,* for appellant.

Sanden, Anderson, Laughlin & Gradwohl, contra.

Heard before GOSS, C. J., ROSE, DEAN, GOOD, EBERLY and DAY, JJ., and MESSMORE, District Judge.

MESSMORE, District Judge.

This action for damages was brought by appellee against appellant, president of Speier's, incorporated, upon a certain contract in writing which provided for the repurchase of stock in said company by appellant from appellee should appellee leave the company's employ. Appellee's employment, by mutual agreement of the parties,

terminated on April 28, 1928, and this suit was brought to recover the value of the stock as of such date under the provisions of said contract.

Appellee's petition alleges that on or about July 1, 1922, he purchased 40 shares of the common stock of the Speier & Simon corporation, of Lincoln, Nebraska, for $125 a share, at which time appellee and appellant entered into a written contract; that subsequently they agreed to a modification thereof, appellee to return to appellant 20 shares of said stock and appellant to cancel a promissory note of $2,500 referred to in said contract, which was done; that in all other respects the contract remained in full force and effect; that appellee's contract of employment was by mutual consent terminated on April 28, 1928, and at that time appellee demanded of appellant the market value of the remaining 20 shares of stock and tendered to appellant said shares; that appellant refused and failed to pay appellee the market value of said stock, which at that time was worth $1,000, and for which amount, with interest, appellee prays judgment.

Appellant's answer admits the purchase of 40 shares of common stock in said company from appellant by appellee for the sum of $125 a share and that said contract was made and entered into as alleged; alleges that the repurchase contract was rescinded by the parties when the dividend note was canceled and the corresponding 20 shares returned to appellant in January, 1928.

Appellee's reply is a general denial.

The evidence adduced at the trial shows that appellee entered the employ of the Speir & Simon Company in 1916. Mr. Simon subsequently left the company and appellee remained in the employ of Speier's, incorporated. On July 1, 1922, appellee and appellant entered into a written agreement whereby appellee was to purchase from appellant 40 shares of common stock in Speier's, incorporated, at $125 a share.

Appellee testified that appellant stated that he would have to have the books of the company gone over by a man at the First National Bank to determine what he should

sell the stock for to appellee. Appellee purchased 20 shares outright for $2,500, giving his note for the balance for $2,500, the entire 40 shares to be held by appellant as collateral security. The stock was issued in two certificates of 20 shares each. The $2,500 note was to be paid for out of dividends on the stock, appellant to receive 6 per cent. interest on the note. There were no dividends paid. In January, 1928, the parties orally agreed that appellant should cancel the $2,500 note and retain the stock for which the note was given. This was done. Appellee terminated his employment with appellant on April 28, 1928, and tendered appellant the 20 shares of stock in question in this case. The contract provided that appellant agreed to repurchase the stock at the termination of appellee's employment at the market value of the stock at that time.

Appellee further testified to the balance sheet prepared by Mr. Buckley, an accountant for Speier's, incorporated; also to the nature, condition, volume and expansion of the business and its losses; further, that appellant refused to buy the stock, asserting it had no market value; and that its market value, in appellee's opinion, on said April 28, 1928, was $45 a share.

Alfred Exley, appellant's bookkeeper and office manager from June, 1918, until appellee left the company's employ, testified that he had complete control of the books of the company, that his duties made him familiar with the business, that the company had made a good deal of money until recently, having built its capital of $18,000 up to a net worth of $131,713 in April, 1928; that later it had operated at a loss and, had all the losses been paid off at the time appellee's employment was terminated, the company then would have had assets of $131,713 more than its liabilities; the good-will of the company in addition to this was worth at least $4,000 to $5,000; the company had a very good reputation; he knew of the sale of 10 shares of stock of the company to a Mr. Davison in the latter part of 1927 at $100 a share; that the trial balance book received in evidence was prepared under his direction to the approval of Mr. Speier showing assets and liabilities of the

company, and the market value of the stock, as shown by such trial balance book as of April 30, 1928, was between $42 and $43 a share; that he bought and sold stock and was familiar with the conditions of transfers of stock in Speier's, incorporated, during the past 8 or 10 years, giving his opinion as to the market value of the stock on April 28, 1928, as being between $42 and $43 a share, having testified to a hypothetical question asked of him of the various facts concerning the assets, liabilities, reputation and general financial condition of the company as well as the 10 shares of stock sold to Mr. Davison by Mr. Speier.

Merlin L. Springer, secretary and treasurer of the Commerce Trust Company for more than five years, testified that he dealt in stocks and bonds and was familiar with such values and with the general reputation of Speier's, incorporated, and with the stock buying community on April 28, 1928; that his company had handled $50,000 of the preferred stock of one of Mr. Speier's competitors, Ben Simon & Sons, and in answer to a hypothetical question which included the reputation of the store, the poor merchandising years for the past few years, the increase in volume of business of the company for the past few months, the cut in overhead, his experience in the stock and bond market, the assets of the corporation, as shown by the trial balance book and financial statement of the company on April 30, 1928, said assets amounting to $463,861.03, and after deducting all liabilities from these assets, there would be left $131,713.85; further, that the preferred stock outstanding was $70,000 and common stock outstanding $145,000, gave it as his opinion that the market value of the common stock was $30 to $32 a share.

Appellant testified that he did not consider the common stock worth anything on April 28, 1928; in his opinion the corporation was insolvent at the time appellee's employment terminated; the company had lost money, a great deal of its loss being due to its expansion and the general conditions existing in the merchandising business following the depression; that he owned $58,000 of the preferred stock of the company and $130,000 of the common stock;

that appellee's note was canceled in January, 1928, appellant retaining the 20 shares of stock evidenced by appellee's note and returning to appellee the 20 shares for which he had paid cash; admitted the filing of an answer in bankruptcy which denied that his company was insolvent as late as May 10, 1928.

Mr. Waugh, vice-president of the First Trust Company of Lincoln, testified he was familiar with the stock and bond market; had examined the April, 1928, statement and was familiar with the general condition of business on April 28, 1928; testified in answer to a hypothetical question similar to that asked Mr. Exley and Mr. Springer and gave as his opinion that the common stock had no market value at that time; testified to an option procured by his company to purchase all of Mr. Speier's stock for $5,500 and that this option was never exercised.

Mr. Buckley testified that he had been an accountant for Speier's, incorporated, for a number of years; had made monthly reports of the business continuously and prepared the trial balance sheet heretofore referred to; that the business had suffered enormous losses and there was no improvement generally; creditors were pressing for payments of obligations; that his monthly reports did not take into account the market value of any of the assets of the corporation and the value of the real estate was fixed in arriving at his reports and that the stock had no market value.

The first assignment of error of importance claimed by appellant is that the contract was rescinded in January, 1928, at the time appellant canceled appellee's note and delivered to appellee the 20 shares for which appellee had paid cash.

There is nothing in the evidence to show that either party, or both, concluded that this action on their part was a rescission of the contract. At most it was modified by the parties to it in January, 1928, by canceling the note which was to have been paid out of dividends on the stock and indorsing the corresponding stock certificate to Speier. This was done. The contract provided that appellant was

to repurchase all the stock at its market value when appellee terminated his employment with appellant. There remained essential elements of the contract to be performed by the parties to it. There is no inconsistency. The evidence will not support rescission. The parties by the agreement of January, 1928, did not cancel, annul or revoke the contract, no new contract existed, but the original contract was reduced, qualified and limited and the jury passed upon this question.

Rescission is an affirmative defense. *Herpolsheimer v. Christopher,* 76 Neb. 355, where the court stated in the opinion that whether rescission and abandonment of the contract by the plaintiff took place at the time the notes were delivered to him is a question which should have been submitted to the jury. *Bartlett v. Scott,* 55 Neb. 477. In the latter case the court declined to weigh conflicting evidence, stating the evidence bearing on rescission to be conflicting and hopelessly irreconcilable. The question of rescission was submitted to the jury in that case as a question of fact. In 13 C. J. 789, sec. 1010, it is stated that it is for the jury to determine whether facts relied on as constituting a breach justifying a rescission have been established.

Appellant did not plead rescission in the municipal court, but did plead it in the district court. Appellee moved to strike this defense from appellant's answer in the district court upon the ground that it changed the issues that were tried in the lower court. This motion was overruled. Appellee's motion was proper. The municipal court and the county court having the same jurisdiction in so far as this case is concerned, the rule as set forth in *Sloan Commission Co. v. Fry & Co.,* 4 Neb. (Unof.) 647, and in *Bankers Union of the World v. Favalora,* 73 Neb. 427, would apply. Appellant received the benefit of this affirmative defense, the same being a question of fact for the jury, and, failing to prove the defense of rescission by a preponderance of the evidence, he cannot now complain.

Appellant cited as error that the trial court did not submit to the jury the proper measure of damages, his contention being that the measure of damages is the difference

between the contract price and the market value, and since, in the contract, the contract price was the market value, there can be no difference between these two amounts.

The contract, as we construe it, provides that the original seller agreed to repurchase the stock from the original purchaser at the market value of the stock at the time the original purchaser terminated his employment with the original seller. Appellee terminated his employment with appellant April 28, 1928. The market value of the stock as of that date is the basis of recovery and made so by the parties to the agreement. The court instructed the jury accordingly. The contract is clear and conclusive as to the basis of recovery.

We are inclined to follow the rule heretofore laid down in this class of cases that the measure of damages for a breach of contract to repurchase stock or other property is the amount which the original seller has agreed to pay the original buyer as the repurchase price rather than the difference between the contract price and the market value. *Fremont Carriage Mfg. Co. v. Thomsen*, 65 Neb. 370; *Stratbucker v. Bankers Realty Investment Co.*, 107 Neb. 194; *Grotte v. Rachman*, 114 Neb. 284; *Griffin v. Bankers Realty Investment Co.*, 105 Neb. 419. Appellee's damages, if any, were the market value of the stock on April 28, 1928, and were a matter of proof and a question of fact for the jury.

The next assignment of error advanced by appellant is that the verdict is not sustained by the evidence and that the assessment of the amount of recovery was too large under the evidence. Most of the evidence relating to market value of the stock has heretofore been set out. The stock was not quoted or listed on any exchange or market and was held almost exclusively by appellant and his family. Appellee resorted to the books of the company and sought by expert testimony to determine the market value of the stock from said books. The evidence discloses that the purchase of the stock in the first instance was made by appellee after appellant had arrived at the figures the stock should sell for from the books of the company.

Where corporate stock is not listed or freely bought and sold in the open market, the assets and liabilities are ad-

missible to show the market value of the stock. In *Rewick v. Dierks Lumber & Coal Co.*, 109 Neb. 300, this court held: "On the question of the value of corporate stock, statements prepared by expert accountants employed by the corporation, forming part of the records of the same and acted upon by the corporation as correct statements of its financial condition, are receivable in evidence as admissions against interest."

From the evidence the jury could very properly return a verdict for the amount returned in this case. The verdict is sustained by the evidence and is not contrary to law.

A number of other errors are assigned; but, while we have carefully considered them all and have read the record and appellant's brief, we do not deem it necessary to refer to them further. We find no prejudicial error in the record and the judgment is

AFFIRMED.

BANK OF COMMERCE OF LOUISVILLE, APPELLANT, V. TILLIE MCCARTY, APPELLEE.

FILED MAY 29, 1930. No. 27211.

1. **Bills and Notes**: NOTE BY WIDOW FOR DEBT OF DECEASED HUSBAND: WANT OF CONSIDERATION. A note given by a widow for the payment of a debt due from her deceased husband's estate, which estate is insolvent, is voidable in law, without a new consideration; and such consideration will not be raised by an agreement on the part of the creditor that the note will be renewed from time to time after maturity.
2. **Evidence**: FORGERY: OPINION OF WITNESSES. The mere opinion of witnesses who testify alone from familiarity with a signature and from comparing genuine and disputed writing has less weight generally on the issue of forgery than expert opinions based on scientific skill and sound reasons.
3. ———: COMPARISON OF WRITINGS BY EXPERTS. The result of comparisons made by handwriting experts is a character of evidence sanctioned by statute and merits proper consideration on the issue of forgery in a civil action.
4. ———: FORGERY: WEIGHT OF EVIDENCE. Testimony of handwriting experts that a promissory note offered in evidence is a forgery and does not bear the genuine signatures of the makers

thereof, if based on sound reasons and circumstances supporting that theory, may be sufficient to overturn the testimony of witnesses that they saw the note executed.

5. Bills and Notes: FORGED NOTE: RIGHT OF ACTION. A forged instrument may not, in absence of a new and adequate consideration, or of elements of estoppel, be ratified by the purported makers thereof so as to confer on the forger himself a right of action thereon.

6. ———: RENEWALS: DEFENSES. As between original parties, and as against transferees who are not *bona fide* purchasers for value, a renewal note is open to all defenses which might have been made against the original note.

7. Evidence examined, and *held* sufficient to support the judgment.

APPEAL from the district court for Cass county: JAMES T. BEGLEY, JUDGE. *Affirmed.*

Jesse L. Root and *C. A. Rawls*, for appellant.

W. R. Patrick and *D. O. Dwyer, contra.*

Heard before GOSS, C. J., ROSE, DEAN, GOOD, THOMPSON and EBERLY, JJ., and LIGHTNER, District Judge.

EBERLY, J.

Suit by plaintiff upon two causes of action consisting of two promissory notes each dated June 30, 1927, due "on demand," payable to plaintiff, and each bearing the signature of defendant as the sole maker thereof, one of which was for $5,000 and one for $1,000.

The issues presented by the record in this cause include: (1) Whether the defendant was induced to sign the instruments in suit by alleged fraudulent representations of the plaintiff; (2) whether the notes in suit were based upon adequate consideration; (3) whether the notes which plaintiff claims constituted the consideration for the notes in suit were forgeries; (4) and whether the defendant, who at all material times prior to March 12, 1926, was a married woman, ever charged her separate estate with the payment of any of the obligations to the bank.

There was a trial to a jury in the district court which resulted in a general verdict and finding for the defendant

as to both causes of action. From a judgment entered thereon, and an order denying a new trial, plaintiff appeals.

The transaction under investigation here opens with the evidence on behalf of the plaintiff of a promissory note payable to the plaintiff bank or order, dated August 22, 1924. The original of this note was not produced, but by secondary evidence the plaintiff seeks to establish it as an instrument executed by Robert McCarty and Tillie McCarty which was carried on the records of the bank as note number 5640. The execution of this note is positively denied by the defendant. Plaintiff sought to introduce in evidence a purported copy of note number 5640, which is identified in the record as exhibit B. This copy had been prepared by the witness on the Friday or Saturday preceding the trial in the district court without having the original in his possession and without making a comparison therewith. On objection, this purported copy was excluded and this ruling of the trial court is challenged as prejudicially erroneous. Without any determination of the technical correctness of the ruling challenged, we are of the opinion that the plaintiff was in no manner prejudiced thereby. Exhibit B contained no words charging "the sole and separate property" of Tillie McCarty as a *feme covert,* save and except: "I, Tillie McCarty, do hereby charge my *personal* estate with the payment of this note." (Italics ours.) At the time of entering into this obligation, according to the evidence of the plaintiff, the sole and separate estate of the defendant consisted of real estate only.

" 'Personal estate,' while a term of wide signification, is not ambiguous or uncertain, its common and legal meaning being entirely clear. In its ordinary legal signification it is understood to embrace every species of property not of a freehold nature, including intangible personal property as well as tangible. It may appear, however, from the surrounding circumstances that the term is used in a more restricted sense, as in the sense of personal effects, or tangible personal property." 48 C. J. 1046, citing *Maxwell v. Maxwell,* 106 Neb. 689; *Stearns v. Stearns,* 103 Conn. 213.

It may be conceded that the wife may pledge certain of her separate estate to the payment of this indebtedness of her husband (for which she is surety), and to the extent of the proceeds of such property her separate estate will be bound. But the right of the creditors to recover against her separate estate extends no further the limitations imposed by the terms of her contract. *Grand Island Banking Co. v. Wright,* 53 Neb. 574; *Northwall Co. v. Osgood,* 80 Neb. 764. In the instant case, the terms of exhibit B, above quoted, apparently limit the payee to recover against the "personal" estate of the wife only. And, though carrying the burden of proof, the plaintiff, so far as disclosed by this record, wholly failed to establish that the defendant possessed any personal estate at the time that this engagement was assumed by her, in view of the rule that the contract of a married woman as surety can only be enforced against the separate estate she possessed at the date of the contract referred to or described therein. *Kocher v. Cornell,* 59 Neb. 315; *Giltner State Bank v. Talich,* 115 Neb. 236. It would seem that the ruling of the trial judge in excluding exhibit B, if erroneous, would be error without prejudice. Certainly this conclusion is inescapable in view of the fact that oral evidence as to the exact terms of note 5640 was subsequently received, which was indeed more favorable to the plaintiff's contention than the terms of the rejected copy.

Proceeding now to the merits of the case, it may be said that the evidence in the record is conflicting. It is not claimed on behalf of the bank that prior to the execution of the notes in suit the defendant was obligated to the bank in any other capacity, save as surety on her husband's obligations. For this purpose it is insisted on the part of the bank that the defendant expressly bound her separate estate. The testimony on behalf of the bank tends to establish that about August 22, 1924, the defendant and her husband executed and delivered to the bank a joint note number 5640 in the sum of $5,000 which, according to the oral evidence introduced on behalf of the plaintiff, contained a clause binding the separate estate of

the wife; that subsequently note number 6367 was taken by the bank in renewal of 5640. This note, number 6367, bore date August 22, 1925, was for the sum of $5,000, due "on demand," and purported to bear signatures of "Robt. McCarty" and "Tillie McCarty," his wife. Robert McCarty died March 12, 1926. Subsequently, on July 6, 1926, a claim was filed in behalf of the bank in the probate court and in the estate of Robert McCarty based upon the promissory note number 6367, and also one of $200 and one of $300, the latter two notes being executed by Robert McCarty only. These claims were duly allowed. The estate of Robert McCarty proved insolvent, and on May 21, 1927, a dividend amounting to $242.42 was received by the bank, "being the first and final dividend." After this sum had been received by the bank it secured from the defendant the two notes now in suit, which are renewals of note number 6367 and the two notes aggregating $500 and interest, less the dividend received and which had been allowed as a claim against the estate of Robert McCarty. So far as disclosed by the probate records before us, Mrs. McCarty received nothing from her husband's estate, save and except the widow's allowance of $1,200 and certain uncollected accounts of doubtful value "in lieu of deceased's exemptions." We do not understand that the allowance of this claim by the county court was in legal effect to charge the defendant with a personal liability for its payment. Indeed, very respectable authority has determined that "A note given by a widow for the payment of a debt due from her deceased husband's estate, which estate is insolvent, is void in law without a new consideration; and such consideration will not be raised by an agreement on the part of the creditor that the note will be renewed from time to time after maturity." *Paxson v. Nields*, 137 Pa. St. 385. It would seem beyond question that the defendant's liability on the notes in suit must be sustained, if at all, upon her own acts in assuming her engagements.

Before entering into a discussion of the conflicting evidence, it may be noted that it is conceded by all parties to

this litigation that the name of Tillie McCarty, appearing in and as subscribed to the promissory note number 6367 of $5,000 which constituted the major portion of the consideration of the notes in suit, was never written by Tillie McCarty, and it is not contended by the bank that the defendant received any of the money represented by this note, or any of the notes of which this note last referred to constituted a renewal, and that none of such moneys entered into or became a part of or in any manner increased or enhanced her separate estate.

It is claimed on the part of the bank that Mrs. McCarty orally adopted the signature affixed to note number 6367 as her own; that the bank thereupon accepted this note in reliance on this fact and canceled and delivered note number 5640 to McCarty. On this point the testimony of the vice-president, one of the active officers of the bank, is that note number 6367 of $5,000 was first handed to him by Robert McCarty. At this time it bore the signature of Robert McCarty only, and that witness thereupon told McCarty: "We had his wife's name on a previous note and had been carrying her as one of the joint makers of the note and that we would not accept this note until she signed it;" that McCarty took the note "and later on, either that day or the next, I can't remember now, returned the note to the bank in the condition that you now see it;" that thereupon it was accepted by the bank, and that later Mr. Cleghorn and Mr. Larson, the cashier, called witness' attention to the signatures and to the fact "that the signature of Mrs. McCarty did not resemble her signature," that the matter was discussed by witness with Mr. Larson, and as the result of the conversation Mr. McCarty was called up and invited to come down to the bank. After he appeared and after a conversation with him, Cleghorn was sent by the bank officers to see Mrs. McCarty to have the signature authenticated. Witness Cleghorn qualifies and testifies that the signature "Robt. McCarty" attached to note number 6367 he knows to be the signature of Robert McCarty. Mr. Cleghorn testifies that he performed certain duties in the bank, and that Mr. Hastain,

the vice-president, requested him to put some notes he had in the note file, or "note case," as he called it. One of these was note number 6367. On examining the signatures on this note this witness states that he noticed the two signatures on this note "Robt. McCarty" and "Tillie McCarty," and he "called Mr. Larson's attention to it, that they looked so much like they were written by the same person," and that afterwards he called Mr. Hastain's attention to it. And this witness also testifies that he personally later presented this note to Mrs. Tillie McCarty, that when he arrived at the McCarty home he told Mrs. McCarty what it was and that it was a note Mr. McCarty had handed to the bank with her name to it, and that "I wanted her to verify her signature," and that Mrs. McCarty thereupon said: "That is all right, Mr. Cleghorn. Whatever Bob does is all right with me."

The defendant in her testimony expressly denies that she signed notes 5640 and 6367, contradicts the evidence of bank's witness Cleghorn, and expressly denies that she "admitted" or ever acknowledged the signature purported to be her own subscribed to note 6367, and wholly denies that she employed the language testified to by witness Cleghorn.

Wallace O. Shane, whose method as a handwriting expert was before this court in the case of *In re Estate of O'Connor*, 105 Neb. 88, testified on behalf of the defendant as an expert that he had examined the signatures attached to note 6367, the handwriting of the decedent Robert McCarty and also of the defendant Tillie McCarty as disclosed by specimens thereof admitted to be genuine, and also a certain exhibit admittedly written by the vice-president of the plaintiff bank. The method of the examinations followed and the reasons for the conclusions of the witness as testified by him in this case were substantially the results of the methods identical with those set forth and described in the case of *In re Estate of O'Connor, supra.* Shane's testimony was to the effect that the signatures attached to note 6367 were not written by either Robert McCarty, the deceased, or Tillie McCarty, the defendant,

but were written by the vice-president, one of the acting officers of the plaintiff bank. The jury's verdict in this instant case was consistent with his testimony which, if sufficient, establishes the facts to be that the signatures in question were forged. In the *O'Connor* case, *supra*, which was a civil action involving the alleged forging of a will, this court reversed the trial court and denied probate to the instrument offered, and in so doing announced the following principles:

"The mere opinion of witnesses who testify alone from familiarity with a signature and from comparing genuine and disputed writings has less weight generally on the issue of forgery than expert opinions based on scientific skill and sound reasons.

"The result of comparisons made by handwriting experts is a character of evidence sanctioned by statute and merits proper consideration on the issue of forgery in a civil action.

"Testimony of handwriting experts that a will offered for probate is a forgery, if based on sound reasons and circumstances supporting that theory, may be sufficient to overturn the testimony of subscribing witnesses that they saw the will executed."

The verdict of the jury in the instant case being a general finding in favor of the defendant, it would seem to follow that the evidence is such as supports the contention of the defendant that the signatures to note 6367 are in truth and in fact forgeries. If this forgery occurred, it must be regarded in law as the forgery of the plaintiff bank of paper by its terms payable to the bank, purporting to arise out of a transaction with the bank, and with no innocent parties involved, save and except the defendant. Such being the case, the bank is responsible for it. In this view of the situation the questions of ratification and estoppel claimed in favor of the plaintiff must be considered as arising in an action or transaction seeking to enforce an instrument forged by plaintiff against the defendant as the purported maker thereof, who in truth under the facts in this case received no part of the consideration involved in the transaction.

The terms of our negotiable instruments act applicable are: "Where a signature is forged or made without authority of the person whose signature it purports to be, it is wholly inoperative, and no right to retain the instrument, or to give a discharge therefor, or to enforce payment thereof against any party thereto, can be acquired through or under such signature, unless the party against whom it is sought to enforce such right is precluded from setting up the forgery or want of authority." Comp. St. 1922, sec. 4634.

Is the defendant here "precluded" from asserting the invalidity of note number 6367? Certain cases hold that irrespective of estoppel or new consideration a forgery may be ratified. *Ofenstein v. Bryan,* 20 App. D. C. 1; *Hefner v. Vandolah,* 62 Ill. 483; *Goodspeed v. Cutler,* 75 Ill. 534; *Paul v. Berry,* 78 Ill. 158; *Murtaugh v. Colligan,* 28 Ill. App. 433; *Casco Bank v. Keene,* 53 Me. 103; *Greenfield Bank v. Crafts,* 4 Allen (Mass.) 447; *Bartlett v. Tucker,* 104 Mass. 336; *Wellington v. Jackson,* 121 Mass. 157; *Central Nat. Bank v. Copp,* 184 Mass. 328; *Corser v. Paul,* 41 N. H. 24; *Howard v. Duncan,* 3 Lans. (N. Y.) 174; *Shroyer v. Smeltzer,* 38 Pa. Super. Ct. 400; *Shannon v. Castner,* 21 Pa. Super. Ct. 294; *Crout v. DeWolf,* 1 R. I. 393. An examination of these cases discloses that a controlling element therein is "The promissor had full knowledge of the facts affecting his rights."

Assuming the testimony of the defendant to be true, she did not possess this knowledge at the time of the transaction pertaining to note number 6367 at the time she signed the notes in suit, and in addition thereto certain misrepresentations were made by the bank's representatives. But, aside from the misrepresentations made by plaintiff testified to by defendant, it would seem that the doctrine announced by the Minnesota case is in point. In *Wilson v. Hayes,* 40 Minn. 531, where alteration had been made in a promissory note, the court, after referring to the conflict of authority, said:

"Where the ratification is made to a third party—the holder of the instrument, who was not a party to the forgery

—we are not called upon to decide whether or not such ratification would create a valid liability on the instrument. All the authorities cited by appellant to the effect that a forgery may be ratified are of this class. But we have found no case where it has been held that a forged instrument can be ratified so as to give the forger himself a right of action upon it. It is legally impossible in such a case that the relation of principal and agent could exist between the parties, for one man cannot be the agent of another to make a contract with himself. Hence, it would seem that the doctrine of ratification can have no application to such a case. * * * But where there has been a fraudulent alteration of a written contract, which not only destroys the instrument but extinguishes the debt, it seems to us clear on principle that a subsequent assent to the alteration, given to the party who made it, without any new consideration, is, in any view of the case, a mere naked promise."

Indeed, a line of well-considered cases evidence the doctrine that without estoppel or a new consideration a forgery cannot be ratified. *Owsley v. Philips*, 78 Ky. 517; *Warren v. Fant's Trustee*, 79 Ky. 1; *Garrott v. Ratliff*, 83 Ky. 384; *Young's Admr. v. Hildreth*, 1 Ky. Law Rep. 401; *Workman v. Wright*, 33 Ohio St. 405; *Hood v. Nichols*, 7 Ohio Dec. 157; *McHugh v. County of Schuylkill*, 67 Pa. St. 391; *Shisler v. Vandike*, 92 Pa. St. 447; *Second Nat. Bank v. Wentzel*, 151 Pa. St. 142; *Henry Christian Building & Loan Ass'n v. Walton*, 181 Pa. St. 201; *Bucher v. Meixell*, 5 Pa. Dist. Rep. 375; *Boone v. Citizens Bank & Trust Co.*, 154 Tenn. 241.

It is to be remembered in the present case that defendant's evidence in the record tends to establish that, in the absence of knowledge on the part of the defendant as to the real nature of note 6367, the plaintiff bank secured its due allowance as a valid claim against the estate of Robert McCarty. Thereafter, while defendant was still in ignorance of the forgery, it also secured her signatures to the notes in suit ostensibly in part as renewal of note 6367. To do this, pressure was exerted, misrepresentations made,

and while defendant was in ill health, and in ignorance of the true facts as to note number 6367, she signed the instruments in suit which are payable "on demand." During these transactions, if witness Shane's evidence is true, the plaintiff bank was at all times chargeable with knowledge that note number 6367 was in truth a forgery which had never been executed either by McCarty or by the defendant. Therefore what the defendant did could in no manner have misled or deceived the plaintiff in this action. If this be true, it could not have been prejudiced in any manner or degree by the acts of the defendant. This court is committed to the doctrine that as between the original parties a renewal note is subject to the same defenses as the original. *Auld v. Walker,* 107 Neb. 676; *Berwyn State Bank v. Swanson,* 111 Neb. 141; *Nebraska State Bank v. Walker,* 111 Neb. 203. We are also committed to the view that, where material and fraudulent alterations are made in a bond evidencing an indebtedness, the bond and debt evidenced thereby are canceled and neither may be enforced against the promissor. *David City Building & Loan Ass'n v. Fast,* 114 Neb. 621. In this case, there being an absence of the elements of estoppel, a new and adequate consideration is required to support the notes in suit, which evidence of the defendant tends to establish did not exist. *Kansas Mfg. Co. v. Gandy,* 11 Neb. 448; *Linton v. Cooper,* 53 Neb. 400.

It is true that the evidence as to note number 6367 being a forgery is sharply conflicting, and the same is true as to the other material points of dispute between the plaintiff and defendant, but a careful examination of all the instructions in the light of the record has convinced us that these disputed questions of fact were properly submitted to the determination of the trial jury and that the evidence before us sustains the verdict which they have returned.

It follows therefore that the judgment thereon is correct and is

AFFIRMED.

WILLIAM B. PRICE, APPELLANT, V. WILLIAM A. FRASER ET AL., APPELLEES.

FILED MAY 29, 1930. No. 27004.

1. **Beneficial Associations.** The Woodmen of the World Life Insurance Association, a fraternal beneficiary society, erected a building in Omaha, a part of which it rented to tenants. Under the law of the state of Nebraska, and its articles of incorporation, it had the power to sell said building.
2. **Quaere.** The question as to whether the Woodmen of the World, a fraternal beneficiary society, had the power under the law to purchase or erect a building, a major part of which is not used by it but rented to tenants, is not presented to the court in this case, and is expressly not determined herein.
3. **Corporations: POWERS: DISPOSAL OF PROPERTY.** All corporations capable of taking and holding property have the *jus disponendi* as fully as natural persons, except as they are restrained by statute, or are prohibited by their articles of incorporation or outstanding contracts; and under this general power a corporation may dispose of the whole of its property for any lawful purpose. *Tash v. Ludden*, 88 Neb. 292.
4. ———: ———: ———. If such an association has not the power to acquire such property, then it has no power to hold it and would be required to dispose of it.
5. **Record** examined and no direct evidence of fraud or lack of good faith on the part of the officers of the Woodmen of the World found therein.
6. **Corporations: FRAUD: PRESUMPTION.** Transactions between corporations having common officers and directors are presumptively fraudulent and the burden is upon the defendants to sustain the transactions by clear and convincing evidence that they were fair.
7. ———: **SALE OF PROPERTY: VALIDITY.** While the court will closely examine for possibility of fraud transactions where the director of a corporation which purchases property is also a director in the corporation which sells the same, such sale, however, is not unlawful and not void, but voidable only, and will be set aside only after a finding that the financial interest of such director is such that he could not have honestly performed his duties as director of the selling corporation. Such a sale will not then be set aside if made in good faith and for an adequate consideration.
8. **Contracts: SETTING ASIDE: INADEQUACY OF CONSIDERATION.** Value of property is always a matter of judgment, and a contract based upon inadequate consideration will not be set aside

for that reason alone, unless, as the rule is generally stated, the inadequacy is so great as to furnish of itself convincing evidence of fraud.

9. Evidence examined as to adequacy and fairness of consideration, and *held* that defendants have established by clear and convincing evidence that the consideration in this case for the leases and sale of the property in question is fair and adequate.

APPEAL from the district court for Douglas county: WILLIAM G. HASTINGS, JUDGE. *Affirmed.*

W. B. Price, C. J. Campbell, John M. Stewart, Don W. Stewart, John P. Breen and *G. E. Hager*, for appellant.

Mullen & Morrissey, Morsman & Maxwell, Brogan, Ellick & Raymond, De E. Bradshaw, J. M. Sturdevant, Calfee, Fogg & White and *Chapman, Cutler & Parker, contra.*

Heard before GOSS, C. J., ROSE, DEAN, GOOD, THOMPSON, EBERLY and DAY, JJ.

DAY, J.

This is an action in equity brought by the plaintiff, on behalf of himself and other members of the Sovereign Camp of the Woodmen of the World, to set aside certain leases and conveyances relating to its home office building, and to quiet title in the association in the same, for that they were fraudulently made by defendants. Plaintiff appeals from a decree in favor of defendants.

The defendant Sovereign Camp of the Woodmen of the World is an incorporated fraternal beneficiary association of Nebraska, and the defendants William A. Fraser, John T. Yates, and De E. Bradshaw are, respectively, its Sovereign Commander, Sovereign Clerk, and general counsel. The defendant Woodmen Building Corporation is a Nebraska corporation which was organized by defendant Byllesby & Company as a holding company and which secured by a circuitous route through defendant William H. Short a 99-year lease upon the property in question from the Woodmen of the World Life Insurance Association for $1,000,000 cash and an annual rental of $44,000 a year. This lease was made to defendant Short as trustee and

assigned by him to the building company. Shortly thereafter the building company secured an option to purchase the fee to said real estate. Simultaneously with the execution of the 99-year lease, another lease was executed by the building company to the life insurance association, leasing for a period of 8 years at an annual rental of $112,668 the quarters occupied by them in said building. This lease was coincident with, and a part of, the 99-year lease. The defendant Continental and Commercial Trust and Savings Bank and William P. Kopf are trustees by mortgage deed from the building company upon its 99-year leasehold. One million, one hundred and twenty-five dollars in bonds were issued, which are secured by this mortgage deed. The defendant Guardian Trust Company is trustee of the fee title by virtue of a deed to it from defendant Albert J. Twerell, who took the title to the fee from the life insurance association. A declaration of trust was issued by the Guardian Trust Company by which it declared that it had issued land trust certificates in the nature of mortgage bonds, totaling $700,000. The plaintiff alleges in his petition that the transfers and lease were fraudulent, *ultra vires*, and void, as against the plaintiff and other members of the association. He asks the court to set aside and cancel the deed from the life insurance association to Twerell as trustee, the deed from Twerell to the Guardian Trust Company, the declaration of trust of the Guardian Trust Company, the option of the building company to purchase, the 99-year lease by the life insurance association to Short as trustee, and its assignment by him to the building company, and the 8-year lease from the building company to the life insurance association.

The trial court found for the defendants upon all the issues. It found that the various leases and conveyances of said property were each and all made upon adequate consideration, and in good faith and without fraud; that they were made in conformance to the statutes of the state of Nebraska, and the articles of incorporation of the Sovereign Camp of the Woodmen of the World; that the charges of fraud and wrongdoing made by plaintiff relative to these

transactions were not sustained by the evidence, and that his petition should therefore be dismissed.

This skeleton outline of the case will enable us to better understand the issues. We purpose to consider this transaction step by step; to analyze the testimony relative to each transaction; to determine with deliberation the effect of each detail upon our ultimate conclusion and thus to arrive at our judgment by a trial *de novo* from the record in this case.

Let us first consider and discuss whether the various leases and conveyances were made in conformance to the statutes of the state of Nebraska and the articles of incorporation of the Sovereign Camp of the Woodmen of the World. Mr. Fraser negotiated the 99-year lease on the property with Byllesby & Company, investment bankers of Chicago. It would perhaps be helpful to follow through the history of this transaction. It indicates a prolonged and persistent effort on the part of Mr. Fraser to dispose of this property. At a special session of the executive council, held at San Antonio, Texas, April 5, 1926, he reported as follows:

"Our Building In Omaha.

"For some considerable time I have been convinced that if we could dispose of our Woodmen of the World building in Omaha, at a reasonable price, it would be to the interests of the organization in general. During all of 1925 I had been investigating the prospects of a sale to some of the institutions in Chicago which promote large real estate transactions, but I found it difficult to interest any of them when the discussion came to selling buildings outside of Chicago."

While there is no record that the executive council directed such activity on the part of the Sovereign Commander, there is also no record of any opposition to it. Coupled with the subsequent approval of the various transactions involved in the leasing and sale of the property, we are driven to the conclusion that it had at least the tacit approval of the council. First, Fraser negotiated a sale of the property for $1,610,000 to a representative of A. C. Allyn

& Company of Chicago. This sale was not consummated because Allyn & Company after an inspection and examination refused. Thereupon Fraser negotiated the controversial lease. The lease was made and delivered to one Short, who took it as agent and trustee for Byllesby & Company. This tentative lease was presented to a called meeting of the executive council in Chicago, Illinois, on February 23, 1926. The minutes of the meeting show that Sovereign Commander Fraser presented a proposition from William H. Short, offering to lease the Woodmen of The World building at Omaha, Nebraska, for a period of 99 years, and to pay for said lease $1,000,000 in cash and $44,000 each year for 99 years, payable semiannually. Then follows a resolution authorizing Fraser and Yates "to make any lease, sale, or other disposition of the real estate and buildings thereon belonging to the society," and providing: "We hereby ratify and confirm the action of said officers in such sale or lease or other disposition thereof." Then followed another resolution of similar purport, by which Fraser and Yates were "authorized, empowered and directed" to execute and deliver, for and on behalf of the Sovereign Camp of the Woodmen of the World, a lease to said land and buildings to William H. Short. Pursuant to this authorization, the officers of the Woodmen of the World executed and delivered the 99-year lease to Short. The Woodmen of the World is incorporated under the laws of the state of Nebraska as a fraternal beneficiary society. Therefore, the power of the Woodmen of the World to dispose of this property must depend upon the statutes of the state of Nebraska and its articles of incorporation. Its articles of incorporation, as last amended, October 2, 1917, and in this particular are substantially identical with the original, provide: "It shall have the power to purchase and hold such real and personal property as shall be necessary for its convenience and use, and may sell, transfer or dispose of the same, as it may deem necessary." It seems that the ordinary meaning of this language is to authorize the society to dispose of its property when it may deem necessary through its regular and legally constituted ma-

chinery for the management of its affairs. The constitution and by-laws of the society, filed in the office of the secretary of trade and commerce, pursuant to the provisions of section 7927, Comp. St. 1922, and in effect in 1926, provide, in section 2, that the Sovereign Camp, among its enumerated powers and duties, "shall have generally such powers and may perform such duties as it may deem wise for the welfare of the association." Section 26 provides that all power and authority of the Sovereign Camp, when not in session, shall be vested in the Sovereign Executive Council. Section 27 provides that the Sovereign Executive Council shall have general supervision and control of all buildings and real estate of the association. Tested by the articles of incorporation and the constitution and by-laws of the association, the executive council would seem to have the power and the authority to execute the 99-year lease.

It is further urged by the officers of the Woodmen of the World that the act of the executive council was ratified by the Sovereign Camp at its meeting at Los Angeles in June, 1927. This, they say, ought to end the controversy. We are not of that opinion. Under the powers conferred upon the executive council by the articles of incorporation and the constitution and by-laws of this fraternal society, this ratification was unnecessary. A failure or refusal to ratify would not of itself have invalidated the lease. Likewise, such a ratification would not validate a lease fraudulently executed, but would only draw the Sovereign Camp itself into the fraudulent transaction. The power and authority of the Sovereign Camp is the same and only exceeded, or rather superseded, that of the executive council, while the former is in session, which is only for short and infrequent intervals. It is also true that the ratification of said Sovereign Camp would not improve nor transform an *ultra vires* act of the association. If such a transaction was *ultra vires* if ratified by the Sovereign Camp, or even if executed at the direction of the Sovereign Camp itself, it would still be *ultra vires* even if executed by the executive council. Further, it may be noted in passing that the findings of fact made by the Sovereign Camp, at the time of

the so-called ratification, are not impressive. It might be said that it resolved itself into a popularity contest between William A. Fraser, Sovereign Commander, and William B. Price, the member who brought this action, with the former exercising an unusually unfair advantage in that he was personally present and directing the proceeding. It might be said that it is apparent from the record that the investigation was superficial and that its action was taken without a full knowledge of the facts. The minutes of the meeting raise a suspicion that perhaps there was too much fraternal back-slapping, and not that serious businesslike consideration the magnitude of the affairs of this great fraternal beneficiary society deserves. Without pointing out in detail the fallacies and weaknesses of the judgment of the Sovereign Camp, suffice it to say that, as far as this court is concerned, the transaction must stand or fall independently of, and without reference to, that ratification.

But, argues the plaintiff, "the limited scope of the business of such an association is definitely fixed by statute." Chapter 120, Laws 1925, provides that a fraternal beneficiary society is "organized and carried on for the sole benefit of its members and their beneficiaries, and not for profit." It is then argued that the leasing of this the largest office building in the state of Nebraska for a period of 99 years is not within the objects and purposes of the association; that it is in fact a commercial transaction that transcends its objects and purposes. It occurs to us that this might with equal force be applied to the leasing of the building, only a relatively small part of which was occupied for its own use, to many tenants, as has been its custom from the date of its erection. It is also suggested that, in view of the decision of this court in *Folts v. Globe Life Ins. Co.*, 117 Neb. 723, there is serious question whether the Woodmen of the World did not exceed its authority in erecting a building, the larger part of which was rented to tenants. Necessity not requiring us to pass upon that question here, we refrain from so doing. We must consider the situation as presented to us. If the Woodmen of the World had the power to own this property, it also had

the power to dispose of it. In *Tash v. Ludden*, 88 Neb. 292, this court stated the law of this state to be as follows:

"All corporations capable of taking and holding property have the *jus disponendi* as fully as natural persons, except so far as they are restrained by statute, or are prohibited by their articles of incorporation or outstanding contracts; and under this general power a corporation may dispose of the whole of its property for any lawful purpose."

On the other hand, if the association had not the power to acquire the property, then it has no power to hold it, and it would be required to dispose of it. If the Woodmen of the World was about to engage in the erection of such a building, we might consider these arguments; but, since it is the disposition of the property, the plaintiff is caught on the horns of the dilemma of his own argument, for the 99-year lease was a portion of the whole transaction, the object of which was the ultimate disposal of all the right, title and interest of the Woodmen of the World in the property. The lease for 8 years by the insurance society of its quarters was coincident with, and a part of, the transaction. There can be no question about the right and power of the society to lease quarters for its necessary uses and conveniences. The only other conveyance involved is that of the fee title which was subsequently executed. By the 99-year lease and the sale of the fee, the Woodmen of the World divested itself of all title and interest in this property. It was, in truth and in fact, a sale of the property. We conclude that the trial court very properly found that the various leases and conveyances of said property were each and all made in conformance to the statutes of the state of Nebraska and the articles of incorporation of the Sovereign Camp of the Woodmen of the World.

We now come to a consideration of the plaintiff's contention that the lease and sale of the property were fraudulently made by the officers of the life insurance association. An examination of the petition filed herein reveals that the plaintiff charges therein that the acts of defendants Fraser, Yates, and Bradshaw were with intent to cheat and defraud the Woodmen of the World, and its members, and with the

unlawful and fraudulent purpose of procuring for their own benefit and profit the possession, control, and ownership of said real estate, for a grossly inadequate consideration, and of procuring for their own benefit and profit control of the defendant's assets and business in violation of their duties and the trust reposed in them by the Woodmen of the World. The further charge is made that the different transactions involved herein were negotiated for the benefit of the financial interest of these parties to the suit. We have carefully scanned the voluminous record in this case with a single eye to the discovery of direct evidence of the personal, beneficial, financial interest of the parties. We are sure that the record justifies the statement that it contains no such direct unequivocal evidence of personal interest or fraud on the part of the officers. The brief of the plaintiff was disappointing in that under the heading of facts and circumstance showing fraud it does not direct our attention to such evidence. In fact, the evidence is quite the contrary. Under oath, in the trial of this case, Fraser, Yates, and Bradshaw all testified that they had no such interest in the transaction, and acted only for, and on behalf of, the Woodmen of the World Life Insurance Association. In the same manner, every man connected in any way with these transactions testified as to his personal financial lack of interest. Consequently, this charge in the petition is not sustained by any direct evidence in the record which would justify the finding of fact by the court that the sale and leases of this property were fraudulently made by the officers because of their personal interest.

But they urge that these defendants caused to be organized the defendant Woodmen Building Corporation which became in the first instance the owner of the 99-year lease on said property. They charge that a majority of the stock of said corporation is, and has been at all times, owned and controlled by the defendants Fraser, Yates, and Bradshaw, and that it was organized to conceal their interest and participation in the transactions under consideration. The testimony in the record relative to this phase is that Mr. Fraser negotiated with Byllesby & Company, investment

bankers, through one Mather for the 99-year lease. When this transaction was consummated, they took the lease in the name of one Short, who held as trustee, and Byllesby & Company caused the Woodmen Building Company to be organized as a holding company for the Woodmen of the World building. When organized, the leasehold interest was assigned to it. Fraser and Bradshaw became at least nominal directors and officers in the new-born corporation. So also did one Crawford, who had been manager of the building for the Woodmen of the World, and who was continued in this position by the new owner and ceased to be an employee of the Woodmen of the World. Crawford was an employee and not an officer of the Woodmen of the World. Crawford was given 500 shares of stock in the new company. The only asset of the company was this leasehold interest subject to a mortgage to secure the bonds issued by the company. The stock was therefore of doubtful value, or at least of remote value. The testimony is that the stock was given him to stimulate his interest for that careful and energetic management might give it some value in the far distant future. Since there is no evidence that Crawford's interest is in any way connected with that of Fraser and Bradshaw, and since he was not an officer of the Woodmen of the World and did not have any connection with the lease and sale of the property, it is unnecessary to consider him further.

We will now direct our attention to Bradshaw, who was not an officer of the Woodmen of the World, but was its general attorney. The relationship existing between Bradshaw and the Woodmen of the World was therefore that of attorney and client. He took no part in the negotiations for the 99-year lease. He was present at the meeting of the executive council, when the lease was authorized, and prepared the resolution empowering the officers to execute the same. However, most of the instruments necessary were prepared by attorneys for Byllesby & Company. Later he became at least a nominal director and an officer of the building company, although he had no obvious and direct part in the organization. There is testimony, which is not

disputed, that he became such director and officer reluctantly and performed few, if any, duties as such. He did not pay for the one share of stock issued to him and he immediately assigned it back. The purpose of having him an officer, as explained by the defendants, was to furnish the proper "sales scenery" for the bonds which had been issued. It was thought that it would establish public confidence to have as officers men known to have been connected with the Woodmen of the World and thus facilitate the sale of the bonds. The Woodmen of the World was to a certain extent interested in the sale of these bonds. It had the desire to dispose of all its right, title and interest in this property. It still owned the fee title and through the lease was to receive $44,000 a year rental. It seemed important to have these bonds successfully marketed before it proceeded to sell the fee title. There is neither direct nor circumstantial record evidence tending to prove that Bradshaw negotiated the deal, or that he conspired with others to defraud the Woodmen of the World, or that he personally derived any financial profit from it, or that he, as attorney for the Woodmen of the World, acted fraudulently.

The other member of the trio charged by plaintiff with defrauding the Woodmen of the World is Fraser, the Sovereign Commander or chief executive officer of the life insurance association. As chief executive officer, he negotiated the leases, as well as the sale of the fee title. He called the meeting of executive council, recommended, asked and secured its approval and authorization of the deal. Stripped of the polite language of the parties, he is charged with having conspired to sell the building for an inadequate consideration that he might profit personally thereby. The record discloses that the sale of this building had become an obsession with him. The plaintiff assigns various reasons for this. Fraser gives others, which are plausible, if true. The reasons given by him to justify the sale of the property are that it is now unsuitable as a home for the order, in that the vault is insufficient and cannot be enlarged except at an exhorbitant expense; that the present income and future earning prospects are insufficient to

make a good investment; that although when built the location was a retail district with most of the leading financial institutions of the city, the business district has now moved to the west, with its retail stores and banks; that it has been impossible to rent the store rooms in the building to profitable tenants. These reasons are also supported by the testimony of witnesses as to the value of the property. While we have detailed these transactions almost to the extent of boredom, let us again examine them relative to Fraser's connection. He negotiated the 99-year lease; he secured the approval of the executive council; he executed the 8-year lease for quarters for the life insurance association, which we will discuss in detail in connection with the adequacy of the consideration; and later negotiated and secured the approval of the executive council and the ratification of the Sovereign Camp. In order to find for plaintiff upon this allegation in his petition, the evidence must be found in the record proving that Fraser entered into a conspiracy to sell the property for an inadequate consideration and as a result he received a financial consideration either of money or its equivalent. There is no direct evidence in the record to support the charge that Fraser was guilty of fraud and wrongdoing in these transactions.

But the plaintiff contends that, since Fraser was a member of the board of directors of the building company and an officer and director of the Woodmen of the World, these transactions between corporations having common officers and directors are presumptively fraudulent, and the burden is on the defendants to sustain the transaction by clear and convincing evidence that it was fair. We find no fault with the authorities cited and recognize the rule contended for as the law of this state reflected by an unbroken line of decisions, including *Fitzgerald v. Fitzgerald & Mallory Construction Co.*, 44 Neb. 463; *McLeod v. Lincoln Medical College*, 69 Neb. 550; *Grand Island Gas Co. v. West*, 28 Neb. 852; *City Trust Co. v. Bankers Mortgage Loan Co.*, 102 Neb. 532. See, also, *Geddes v. Anaconda Copper Mining Co.*, 254 U. S. 590, 599; 4 Fletcher, Cyclopedia, Corporations, sec. 2377.

But, again, when we examine the evidence in this case, we find that it falls far short of establishing the facts in this connection upon which the plaintiff relies. In the first place, the proof establishes that this 99-year lease was negotiated and consummated with Byllesby & Company, and that at all times thereafter they exercised domination and control over it. At that time the building corporation was not born and the title was held by Short as trustee for Byllesby & Company. The 8-year lease by the Woodmen of the World for the quarters occupied by it was executed coincident with, and as a part of, the 99-year lease. Therefore, as to these two transactions the rule is not applicable, since these two transactions were not negotiated by and between two corporations having common directors and officers. It is undisputed that Byllesby & Company, the investment bankers who disposed of the bonds, zealously guarded their control and management of the property for the purpose, as given by them, that they might protect the purchasers of the bonds, toward whom they recognized their responsibility. To this end, they retained a majority of the stock in the building company. It appears that Fraser was issued one share of stock, which he immediately reassigned. Upon this share of stock, which was reassigned, he was elected a director and officer of the corporation. He never participated in any meeting of the Woodmen Building Corporation, and particularly did not participate in any meeting which considered the acquisition of the option to purchase the fee to said building. He was never a regular stockholder, having a financial interest in the corporation. The only transaction that could be questioned because Fraser was a director of the Woodmen of the World and the building corporation was the sale of the fee. But this deal was between Woodmen of the World and Byllesby & Company. Fraser was not a director of Byllesby & Company. After their purchase the fee ran to the building corporation. They organized the Woodmen Building Corporation as a holding company for this property and all their interest in it was centered and controlled by it as a subsidiary. The foregoing facts

are testified to by all the witnesses who testify as to the circumstances involved in and surrounding these transactions. The conclusion is amply justified by the evidence that Fraser, as an officer and director of the Woodmen Building Corporation, was just another "set up" used by Byllesby & Company to properly set the stage for the sale of bonds, and that as such an officer he served no other useful purpose. To conclude, these transactions between the Woodmen of the World and the Woodmen Building Corporation were not between two corporations controlled and directed by the same officers and directors. Even if they were, the court would not set them aside if they were fair, and fairness in this case depends upon the adequacy of the consideration. While the court will closely examine for possibility of fraud transactions where the directors of a corporation which purchases property are also directors in the corporation which sells the same, such sale, however, is not unlawful and not void, but voidable only, and will be set aside only after a finding that the financial interest of such directors are such that they could not have honestly performed their duties as directors of the selling corporation. Such a sale will not, then, be set aside if made in good faith and for an adequate consideration. *City Trust Co. v. Bankers Mortgage Loan Co.*, 102 Neb. 532; 14 C. J. 125; 7 R. C. L. 461, sec. 444.

We have concluded that there is no direct evidence tending to prove the charges of fraud contained in the plaintiff's petition, but he argues strenuously and with apparent conviction that there are facts and circumstances which justify the inference of fraud. We have already discussed Fraser's connection with the deal, his negotiation of the 99-year lease and subsequent approval of the executive council; his connection with the Woodmen Building Corporation. We will now discuss the adequacy of the consideration for the sale of the building. In this connection we will consider the 99-year lease, the 8-year lease, and the sale of the fee as a single transaction for the disposition of the property. The defendants contend that all these transactions involved the Woodmen of the World

only to the extent that it executed a 99-year lease to one Short, and then sold the fee to Byllesby & Company, and at their direction conveyed title to one Twerell, and that all other and succeeding transactions were means employed by the lessee and grantee respectively to finance their investment. The elaborate and complicated machinery set up and employed to accomplish this simple transaction may well be expected to cause at least temporary misunderstanding and confusion. For the 99-year lease the Woodmen of the World received $1,000,000 and $44,000 a year rental. As heretofore stated, this lease was negotiated with Byllesby & Company, taken by Short in trust for them, and finally assigned to the Woodmen Building Corporation, which issued bonds to the extent of $1,125,000 to pay for said lease and promotion expenses. Examining the 8-year lease which the Woodmen of the World gave to the building corporation, we find that the Woodmen of the World had maintained a system of accounting while owning the building, in which they charged themselves a certain rental for the quarters occupied by them, which was in excess of the rental paid by other tenants for similar space. This fact was known or could have been ascertained by every member of the executive council, Sovereign Camp, and of the order. This went into the annual report of the building and the statement of the net income derived from the building. The tendency of this method of accounting made the building look more attractive as an investment than actual facts justify. It was the statement exhibited to Byllesby & Company at the time of the negotiation of the 99-year lease. When Byllesby & Company discovered this, they insisted that the Woodmen of the World should enter into a lease at that rental for a term of years or they would not go through with the deal. It probably amounted to an unintentional misrepresentation of a material fact as to the income of the building. Finally, as a part of the 99-year lease transaction, the Woodman of the World executed the said lease for a period of 8 years at what is conceded to be an excessive rental. This, of course, reduced the amount received by the Wood-

men of the World for the 99-year lease by the amount the rental under the 8-year lease was excessive. As soon as these transactions had been completed and the bonds secured by the 99-year lease had been sold, Fraser began negotiations for the sale of the fee with Byllesby & Company. As a result of these negotiations the fee was sold for $600,000 and transferred to Twerell as trustee. Land trust certificates were issued and sold to finance this transaction. It was at this time that Byllesby & Company secured the option to purchase the fee to the Woodmen Building Corporation controlled by them. It appears, then, that reduced to its final analysis the Woodmen of the World in fact sold the building to the Woodmen Building Corporation for the sum of $1,600,000, less, of course, the amount of excess rental paid by it under the 8-year lease for its quarters, and the question for our determination is whether that is an adequate consideration.

The plaintiff asserts that the consideration was inadequate for the reason that it was less than the cost of the building. We can save many words by including the following tabulation which shows the investment of funds by the Woodmen of the World, and the dates thereof:

1911	Cost of land	$ 240,000.00
	Total investment	240,000.00
1912	Cost of building (including machinery and equipment)	1,114,302.24
	Total investment	1,354,302.24
1920	Cost of additional floor	93,846.27
	Total investment	1,448,148.51
1920	Improvements and additions to machinery and equipment	83,714.63
	Total investment	1,531,863.14
1920	Cost of Annex land	73,876.40
	Total investment	1,605,739.54
1921	Cost of Annex building	360,778.16
	Total investment	1,966,517.70
1925	Cost of additional equipment	4,435.52
	Total investment	1,970,953.22

There is testimony in the record that 3 per cent. is a reasonable annual depreciation, and at that rate the depreciated cost value of the building was $1,462,000. While the cost of a building is not contended to be an absolute criterion of its value, it is some evidence to be considered in connection therewith. The same thing is true as to testimony of the cost of reproduction of the building. The reconstruction cost of said building, according to a member of the firm of original architects, was $2,600,000, after deducting reasonable depreciation. According to this same witness, there was little evidence of so-called wear and tear; its upkeep was excellent, and particularly the mechanical features of the building seemed to be in wonderful condition; its life was practically unlimited with proper upkeep. However, we think this witness himself evaluated testimony of this character in reply to a question as to whether the cost of reproduction would not be as much out on the desert; he said it would be more. It might also be true that a building so located would not be salable, and would have no market value.

Fraser also testified as to the value of the building at the time of the sale, "that it was a good sale and the price a good one." At this same time, in order to assist Bylles-by & Company to market the bonds on leasehold, he writes and signs a letter, many copies of which were circulated. In that letter he expresses an opinion as to the value of the building in the following paragraphs:

"The land has been appraised by A. L. Reed, of Omaha, at $410,000, and by H. A. Wolf, of Omaha, at $408,000. Holabird & Roche, architects, Chicago, who supervised the construction of the main building, have appraised the buildings as of January 18, 1926, at a sound depreciated or fair market value of $2,600,240. The total fair market value of land and buildings, as thus depreciated, is in excess of $3,000,000, making this issue a 37½ mortgage."

"Total gross income for the two calendar years ended December 31, 1925, averaged $327,983. Operating expenses, including all taxes, except federal taxes and maintenance, and adding thereto the leasehold rental of $44,000 per annum for the same periods, averaged $206,500.74."

We may well digress here to state that neither A. L. Reed nor H. A. Wolf, mentioned in the letter, testified in this case, hence we cannot attribute any force and effect to the appraisal that they are claimed to have made as competent evidence of value. These statements would violate the rule as against hearsay evidence. Mr. Foy, an associate of Holabird & Roche, architects mentioned, did testify. He testified to the reconstruction cost of the building and his testimony makes this plain. He expressly states that he is not making an estimate of the market value of the building. The evidence in the record that Myers and Auerback, two Omaha real estate men, made affidavits as to the value of the property falls into this same classification of incompetent testimony.

Returning to Mr. Fraser, in July, 1925, in a report to the Sovereign Camp, he stated that the building and its annex were carried in our statement of assets at $1,966,-517.70, actual cost, while undoubtedly the property is worth considerably more, not only due to the increase in value of ground, but the increase of material and labor. Of course, we must again point out that this is not competent evidence of value. These statements, as well as the other statements made by him herein, are not under oath, and for the purposes of this case can only be considered as impeaching the witness upon the question of value. The fact is that the record discloses so many widely divergent and contradicting statements by him at various times that, in view of his special interest in this litigation, we deem it necessary to determine this phase from other testimony. Particularly is this true, because from the record it is so apparent that he does not at any time base his judgment of market value upon sound premises. His judgment in this particular seems to be based upon the reproduction cost as well as the income as shown by the account set up by the Woodmen of the World relating to the building. This account indicated an income far in excess of actuality. This was true on account of the fact that an item of rent was carried as income for space occupied by the Woodmen of the World itself in excess of its real value

and because the account did not include all items of expense properly chargeable to the upkeep and maintenance and operation of the building.

The plaintiff relies, not only upon the foregoing statements of value which we have determined are not competent evidence of value, but also upon the fact that the purchasers of the building sold bonds secured by it in excess of the purchase price. The total amount received by the Woodmen of the World for the building was $1,600,000, while the amount of the bonds and land trust certificates secured by the building sold was $1,825,000, some of which were sold at a discount. Does this establish that the building had a market value greater than the selling price? We doubt whether there is any real indication of value of the building from the amount of bonds sold upon its security. The bonds issued upon the leasehold sold for $1,057,500. The purchasers of the bonds never saw the building and bought it upon the representations and reputation of the investment house that sold them.

We come now to a consideration of the most convincing evidence in the record relative to value. In fact, it is the only competent evidence as to value in the record. Even if we were to consider the foregoing statements as competent testimony, it is overcome by competent tsetimony that the property was not worth in 1927 the price received of $1,600,000. The testimony of Charles C. George shows that he possesses a thorough knowledge of real estate values, of business locations, of office buildings, and of the trend of the movement of desirable business locations in Omaha. He values the property at $1,550,000 to $1,600,000. Mr. Harry A. Tukey, who had been in the real estate business in Omaha since 1886, and specialized in business properties, buying, selling, and leasing, including what is known as long time leases, such as 99-year leases, who has had vast experience as an appraiser, fixes the market value of the property at $1,300,000 to $1,500,000. He sold the ground to the Woodmen of the World at the time they erected the building. Mr. L. P. Campbell who had been with the Byron Reed Company, one of the largest real

estate offices in Omaha and in Nebraska, in charge of sales since 1905, and of rentals, property management, and insurance, and who also has had an extensive experience as an appraiser of city property, places the market value on this property as $1,500,000 to $1,600,000. These three witnesses, George, Tukey, and Campbell, show an unquestioned knowledge of real estate values in Omaha. They testified that there is and has been for years a westward movement of the business district, which has made the location of the Woodmen of the World less desirable than when it was built; that since then many of the banks which were east of it have moved two or more blocks west; and other business has moved away from it to such an extent that the building will not return an income which will justify a higher valuation; that income, present and prospective, determines along with other considerations the market value of a building of such a nature. Their testimony is not impeached and it is not contradicted by any other competent testimony. They had no apparent interest in the litigation. Value of property is always a matter of judgment, and a contract based upon inadequate consideration will not be set aside for that reason alone, unless, as the rule is generally stated, the inadequacy is so great as to furnish of itself a convincing evidence of fraud. 9 C. J. 1174. However, from the competent evidence in the record, we conclude that the consideration of $1,600,000 for the sale of the building, even depreciated by the excessive rental of the 8-year lease, was an adequate and fair consideration for the sale of the property. Upon this question, the defendants have sustained the burden of proof to establish by clear and convincing testimony the fairness of the contract even to the degree required of them, even if, as a matter of fact, these transactions were between corporations with common directors.

This case involves almost entirely a question of fact. Its importance, from the magnitude of the value of the property and the great number of people interested, including all the members of the great fraternal beneficiary society, who are as much interested as the plaintiff, as well as the

numerous purchasers of the bonds, justifies the exhaustive consideration we have given it. We have been greatly aided by comprehensive and elucidating briefs, and oral arguments by able counsel. In view of our conclusions, it is not necessary to consider either the rights of the purchasers of the bonds secured by the 99-year leasehold, or the purchaser of the land trust certificates, since they are not affected by this opinion. The briefs filed by the representatives of these interests have been exceedingly helpful in so far as they discussed the questions covered by this opinion.

In conclusion, we substantially adopt the language of the distinguished trial judge who heard the case, and find that the 99-year lease from the Woodmen of the World to William H. Short, and the lease from the Woodmen Building Corporation to the Woodmen of the World, leasing a portion of the building for 8 years, and the sale and conveyance of the fee by the Woodmen of the World to Albert J. Twerell were each and all made upon adequate consideration and in good faith and without fraud, and were made by the officers of the Woodmen of the World in accordance with the statutes of the state of Nebraska, and the court further finds that the charges of fraud and wrongdoing alleged in the plaintiff's petition are not sustained by the evidence. The judgment of the trial court is accordingly affirmed.

AFFIRMED.

ROSE, J., dissents.

STATE, EX REL. WILLIAM M. MALTMAN, APPELLEE, V. ADAMS COUNTY, APPELLEE: M. FRED RUHTER, APPELLANT.

FILED MAY 29, 1930. No. 27218.

1. **Counties:** COUNTY COMMISSIONERS: COMPENSATION. Section 2389, Comp. St. 1922, does not limit the total maximum amount of compensation, including mileage and *per diem*, to be paid or drawn by any member of the county board of Adams county to $950, but he may be paid, in addition to said $950, $5 for each day he is actually employed in directing road work in his district.

2. ———: ———: ———. Neither section 2389, Comp. St. 1922, nor section 951, Comp. St. 1922, as amended by chapter 44, Laws 1923, permits a member of the county board to be paid mileage in addition to said $5 a day for directing road work.
3. ———: ———: ———. Said additional amount over and above the $950, in fact anything paid to him for directing road work in his district, must be paid out of the road fund of his district, and under section 951, Comp. St. 1922, as amended by chapter 44, Laws 1923, the road fund of his district cannot include any money paid as automobile or motor vehicle registration or license fees.
4. Highways: ROAD DRAGGING FUND: TRANSFER. Section 8339, Comp. St. 1922, as amended by section 4, ch. 158, Laws 1925, so as to provide "any unexpended balance in the road dragging fund may be used for road construction," does not enlarge the provisions of section 951, Comp. St. 1922, as amended by chapter 44, Laws 1923, so as to permit an unexpended balance in the road dragging fund composed exclusively of money paid as automobile and motor vehicle registration and license fees to be transferred to a fund set aside for the use of the separate supervisor districts.
5. *Held*, under the stipulation of facts and the law in this case, that the appellant, Ruhter, is not entitled to recover.

APPEAL from the district court for Adams county: J. W. JAMES, JUDGE. *Affirmed.*

Charles E. Bruckman, for appellant.

Stiner & Boslaugh and *Edmund Nuss*, *contra.*

Heard before GOSS, C. J., ROSE, DEAN, GOOD, THOMPSON and DAY, JJ., and LIGHTNER, District Judge.

LIGHTNER, District Judge.

This case originated as a claim for $138.90 filed by M. Fred Ruhter before the county board of Adams county. The county board allowed the claim, but on appeal by a taxpayer to the district court it was disallowed, and the claimant has appealed to this court.

It appears from the statement of the case by appellant's counsel, which counsel for appellee agrees is correct, that Adams county, Nebraska, is under township organization and is divided into seven supervisor districts, Nos. 1, 2, 3,

and 4 in the country, and Nos. 5, 6, and 7 in the city of Hastings; that for a number of years last past Adams county has been divided into highway or road improvement districts, and for such purposes supervisor districts Nos. 1, 2, 3, and 4, being the supervisor districts outside of the city of Hastings, have been adopted, and that each of the supervisor districts is equipped with machinery necessary and in use for the purpose of repairing, maintaining and constructing roads and highways; that in the time and manner provided by law the county board of supervisors appointed, for the year 1928, John H. Furry, a member of said board, as highway commissioner; that M. Fred Ruhter is the duly elected, qualified and acting supervisor of district No. 3, comprising the townships of Roseland, Cottonwood, Silver Lake, and Logan; that for the year 1928, and for a number of years previously, funds used for county highway and general road purposes have not been provided for by levy and taxation; that the only funds needed and used for such purposes have come from automobile licenses or registrations and in the manner provided by law; that at a regular meeting of the board of supervisors held on the 5th day of April, 1928, the board of supervisors appropriated $20,000 from the road dragging fund to the county highway budget for the year 1928, and divided this amount equally among said supervisor districts Nos. 1, 2, 3, and 4, and this amount was adopted and treated as the budget to cover all costs of construction and maintenance of the county highway system for the year 1928, and at this same session of the board instructed the county treasurer to transfer $16,800.71 in his possession from the road dragging fund to the highway fund, which was done by the treasurer, and this amount was to be used in equal portions in said supervisor districts Nos. 1, 2, 3, and 4; that on the 11th day of September, 1928, there remained in said county highway fund $1,600.22 of said portion distributed to said supervisor district of M. Fred Ruhter; that immediately previous to said date the said supervisor, M. Fred Ruhter, prepared and filed his duly itemized, certified claim against said county for $138.90, $105 of which was

for 21 days superintending road work in the various townships of his district, and $33.90 for mileage at the rate of 10 cents a mile, and all of which labor was performed and miles driven under the appointment, order and direction of the said John H. Furry, highway commissioner; that on said date, September 11, 1928, at a regular session of said board of supervisors, the above claim was duly audited and allowed and a warrant ordered issued for its payment; that the claimant, M. Fred Ruhter, had received as a member of the county board of Adams county, Nebraska, during the year 1928, up to the 11th day of September, 1928, from the funds of Adams county, Nebraska, the sum of $1,134.60, of which amount $561.90 was paid from the county highway road fund, $473.90 from the county general fund, and $98.80 from the county road dragging fund, being for both *per diem* and mileage as a member of the county board in attending the meetings and business of the board, and for necessary services in maintaining and supervising the roads and bridges in his district, together with mileage.

Section 2389, Comp. St. 1922, fixes the compensation for members of the county board. Each party to this controversy insists that said section supports his claim. Said section is as follows:

"Members of county boards shall each be allowed for the time they shall be necessarily employed in the duties of that office the sum of five dollars per day and ten cents per mile to be paid out of the general county fund: Provided, however, in counties having over one hundred thousand inhabitants, members of the county board shall devote each and every day to the duties of the office and shall be allowed a salary of twenty-five hundred dollars per annum as compensation in full for their services: Provided, further, in counties having over sixty thousand inhabitants and less than one hundred thousand inhabitants, members of the county boards shall be allowed a salary of twenty-one hundred dollars per annum as compensation in full for their services: Provided, further, the total maximum amount of compensation, including mileage and *per diem*

to be paid or drawn by any member of the board, *except as hereinafter provided,* shall not exceed the following amounts per annum; in counties under township organization having twenty-five thousand inhabitants and less than sixty thousand inhabitants, nine hundred fifty dollars; in similar counties not under township organization, fifteen hundred dollars; in counties under township organization, and having over thirteen thousand and less than twenty-five thousand inhabitants, eight hundred dollars; in similar counties not under township organization thirteen hundred dollars: *Provided, however, that in counties not under township organization where said county contains an area of not less than two thousand square miles of territory and also contains a population of over fifteen thousand inhabitants and less than twenty-five thousand inhabitants the total maximum amount of compensation, including mileage and per diem to be paid or drawn by any member of such board, shall not exceed the sum of fifteen hundred dollars per annum;* in counties under township organization having less than thirteen thousand inhabitants, six hundred dollars; in similar counties not under township organization, nine hundred fifty dollars: Provided, further, that for each day actually employed in directing road work in his district each member of the county board shall be paid the sum of five dollars per day to be paid out of the road fund of his district."

Appellee contends that the words "except as hereinafter provided" refer to the portion of the section which we have italicized, and that therefore the $950 per annum limitation for salary to each member of the board in counties having the population of Adams county is an absolute limitation and is the total maximum which members of the board in such counties may draw as compensation and mileage. Appellant on the other hand contends that the words "except as hereinafter provided" refer to the final proviso of section 2389, and that therefore, in addition to the $950, each member of the board is entitled to $5 a day, and mileage, to be paid out of the road fund of his district for each day he is actually employed in directing the road work of his district.

The history of this section throws very little light on its present meaning. It was originally enacted in 1866. Rev. St. 1866, ch. 19, sec. 22. It has been amended a number of times since that date, but the words "except as hereinafter provided" and the two provisions we are dealing with were both introduced at the same time, in the year 1915. Laws 1915, ch. 40. The amendment immediately preceding was in 1913. Laws 1913, ch. 196. However, the 1913 amendment did not contain the words "except as hereinafter provided," nor the italicized provision, nor the final provision. All of these were introduced in the 1915 amendment. The section was afterwards amended to its present form in 1919 (Laws 1919, ch. 68) but the changes were not such as to throw any light upon the present meaning of that section.

Turning then to an examination of the section, it will be noted that the words "except as hereinafter provided" are placed in the opening part of that part of section 2389 which provides the total maximum amount of compensation including mileage and *per diem* to be paid or drawn by any member of the board. It would seem therefore that the legislature intended to refer to an exception or proviso which permitted the member to draw more than the total maximum referred to. It will also be noted that the proviso above italicized does not have reference to all of the counties wherein the total maximum amount of compensation is fixed, but only to counties under township organization where said county contains an area of not less than 2,000 square miles of territory and also contains a population of over 15,000 inhabitants and not less than 25,000 inhabitants. Apparently then said italicized proviso has reference only and is an exception to the second class of counties referred to; that is, counties having over 13,000 and less than 25,000 inhabitants, or counties not under township organization having an area of not less than 2,000 square miles and also a population of over 15,000 and less than 25,000 inhabitants. It would not have been necessary to use the introductory exception, "except as hereinafter provided," with regard to this italicized proviso, and if said

words were intended to refer to the italicized proviso they would have been used in the part of the section which refers to the second class of counties having over 13,000 and less than 25,000 inhabitants. The words "except as hereinafter provided" may refer to both provisos which follow in the same section, but it would be giving them a very strained and unnatural interpretation to hold that they refer to the italicized part of the section only and not to the final proviso. Furthermore, the wording of the whole section indicates that the final proviso refers to additional compensation over and above the $950 limitation. It is in fixing the total maximum that the words "except as hereinafter provided" are used. And the final proviso does not refer to the work of the member while employed in the duties of that office, but refers to separate individual work of the member; that is, work while actually employed in directing road work in his district. And this is also a class of work where it would be difficult to make a reasonable limitation because there might be instances such as unusual floods in a district containing a great many creeks, draws and so forth where a much greater amount of work than ordinary would be required.

We conclude, therefore, and hold that, in addition to the $950 per annum that each supervisor is entitled to, he is also entitled to $5 a day for each day actually employed in directing road work in his district, to be paid out of the road fund of his district.

Appellant claims that he is entitled to mileage in addition to said $5 a day for directing road work under the provisions of section 2389 and section 951, Comp. St. 1922, as amended by chapter 44, Laws 1923. The only reference to mileage in section 951 is the last sentence of the section which is as follows: "The supervisors shall receive the same compensation for their services, and mileage as now provided for, for county commissioners, except in counties over seventy thousand inhabitants, where their salaries shall be fixed by law." Section 951 provides for the expenditure of district road money by the county supervisors. The sentence just quoted makes the same provision for the

compensation and mileage of supervisors as is made for county commissioners. The only section that fixes the compensation and mileage of both supervisors and commissioners is section 2389. Section 951, as amended, makes no specific provision, but refers to compensation and mileage "now provided for," and evidently refers to section 2389, since it is the only provision of law fixing compensation and mileage. But section 2389 does not allow mileage while either the commissioner or supervisor is directing road work. Section 951, in our judgment, adds nothing to appellant's claim for mileage for the reasons just stated. There is then in the statute no specific provision for mileage and therefore none can be allowed. *Gosso v. Riddell*, 123 Or. 57; *State v. Haner*, 123 Or. 301. The court cannot amend the statute by construction (*Chicago, B. & Q. R. Co. v. Amack*, 112 Neb. 437); nor alter it on the theory that the legislature made a mistake (*State v. Marsh*, 108 Neb. 267); nor ingraft an exception on a statute by construction (*Schmidt v. City of Fremont*, 70 Neb. 557).

Appellee further contends that, even though appellant might be allowed compensation under section 2389 in addition to the $950, it must be from the road fund of his district, and that there is in Adams county no fund of that description out of which appellant can be paid. We think that this contention is good.

The case was tried on a stipulation of facts, and the stipulation provides that at no time in 1928 did Adams county set aside, create or maintain any separate district road fund for any particular district in Adams county, but that the road fund is maintained as one fund, known as the county highway fund, and said county highway fund is not and has not been during the year 1928 the proceeds of taxes levied upon the property of the county from the various districts within the county, but that said fund has been provided from money collected for automobile licenses within said county, and at the regular meeting of the board, held on April 5, 1928, a motion was made to appropriate $20,000 from the road dragging fund to the county highway budget to be divided equally among su-

pervisor districts Nos. 1, 2, 3, and 4, respectively, in the amount of $5,000 to each named district, and that later a resolution was passed directing the county treasurer to transfer $16,800.71 from the road dragging fund to the county highway fund, and that said transfer was so made. We think the appellant is right in claiming that the fund from which appellant may be paid need not bear any particular designation and that he may be paid out of the road fund of his district whether it be called a road fund or a highway fund or any other name. It is sufficient if it is a fund legally set aside to be used under his direction for the improvement of roads within his supervisor district. Nevertheless an analysis of section 8339, as amended by section 4, ch. 158, Laws 1925, and section 951, as amended by chapter 44, Laws 1923, indicates that the fund in question, derived as stated in the stipulation from automobile licenses and registration fees, cannot be assigned to the different supervisor's districts for the purpose in question, and since there is no other fund for such purpose provided in Adams county there is no fund out of which the appellant can be paid. Let us now proceed to an analysis of the sections in question.

Section 8339, as amended, provides that "any unexpended balance in the road dragging fund may be used for road construction." Road construction would, we think, include the directing referred to in the final proviso of section 2389. However, section 951, as amended, provides as follows:

"The board shall meet at such times and in such manner as provided by law. Each supervisor shall have special charge of the expenditure of money appropriated out of the county treasury by the board for roads, bridges and culverts within his district, except in city districts, when the board shall direct as to which one of the supervisors shall supervise the expenditure of the money appropriated as aforesaid. Said money so appropriated shall not include any money paid as automobile or motor vehicle registration or license fees and shall not be distributed by said board to the individual members thereof to be by them

personally paid out upon their own private account nor in any manner whatever; but shall remain in the county treasury until a claim or claims for labor performed shall be properly verified, approved by said supervisor, filed with the county clerk, allowed by the county board, and a warrant drawn therefor. The supervisors shall receive the same compensation for their services, and mileage as now provided for, for county commissioners, except in counties over seventy thousand inhabitants, where their salaries shall be fixed by law."

The stipulation states in one place that the fund in Adams county in 1928 which is now sought to be used to pay appellant's claim has been provided from money collected for automobile licenses within said county, and in another place it says that said fund has "not been provided for by levy and taxation; that the only funds needed and used for such purposes have come from automobile licenses or registrations and in the manner provided by law." Appellant in his brief also refers to this money as having been derived exclusively from motor vehicle registrations, and therefore we would not be justified in construing the words of the stipulation "and in the manner provided by law" as referring to the gasoline tax or other sources from which this fund might have come. There is nothing inconsistent between the provisions of section 951, as amended, and section 8339, as amended. In other words, the unexpended balance referred to in section 8339 may be used for road construction, which would undoubtedly include directing and supervising, but it cannot be apportioned to the different supervisor districts under section 951, as amended. The fund referred to in section 2389 as "the road fund of his district" could be used in payment of appellant's claim, if it came from sources which are not prohibited by section 951, as amended. But, inasmuch as the only money set aside as a road fund of appellant's district came from automobile and motor vehicle registration and license fees, there is no road fund in his district out of which his claim can be paid. It is not necessary to decide in this state of the record whether or not

"the road fund of his district" may come from the road tax referred to in section 2630, Comp. St. 1922, because the stipulation is that no such tax was levied in Adams county either in 1928 or for several years prior thereto. Other sections of the statute also permit a levy for road purposes. See section 5979, Comp. St. 1922, and section 5979, as amended by chapter 176, Laws 1927. It is unnecessary to analyze these sections, but it is sufficient to say that under one or the other of them the county board of Adams county could probably have levied a tax and the money so raised could probably have legally been appropriated as to the supervisor district Mr. Ruhter represented and could have been applied in payment of his claim. However, the board did not see fit to provide any money which can be properly appropriated to his district and legitimately applied to the payment of Mr. Ruhter's claim.

In addition to moneys from automobile licenses and registrations, certain moneys collected from the gasoline tax are appropriated to the road dragging fund, and there is no prohibition against such moneys being used by the supervisors under the provisions of section 951 as amended. However, it appears from the stipulation that none of the fund in question came from such source.

For the reasons above stated, the judgment of the district court is right and it is hereby

AFFIRMED.

CASES DETERMINED

IN THE

SUPREME COURT OF NEBRASKA

SEPTEMBER TERM, 1929.

PETER J. ROONEY, APPELLANT, V. EDWARD J. FLANAGAN, APPELLEE.

FILED OCTOBER 11, 1929. No. 26772.

APPEAL from the district court for Douglas county: HERBERT RHOADES, JUDGE. *Affirmed.*

Gray, Brumbaugh & McNeil, for appellant.

Monsky, Katleman & Grodinsky and *A. F. Brungardt, contra.*

Heard before GOSS, C. J., ROSE, DEAN, EBERLY and DAY, JJ., and REDICK, District Judge.

PER CURIAM.

This is an appeal by plaintiff from a judgment of the district court for Douglas county in an action brought to recover money alleged to have been paid out by plaintiff for the use and benefit of defendant.

We have carefully considered the record and find that the same is without prejudicial error. The judgment of the district court is, therefore,

AFFIRMED.

MINNIE G. HIMES, APPELLEE, V. RONALD F. LEWIS ET AL., APPELLANTS.

FILED OCTOBER 11, 1929. No. 26773.

APPEAL from the district court for Lancaster county: FREDERICK E. SHEPHERD, JUDGE. *Affirmed.*

C. E. Sanden and *Bernard S. Gradwohl*, for appellants.

T. F. A. Williams, Homer L. Kyle and *Rolla C. Van Kirk, contra.*

Heard before ROSE, DEAN, EBERLY and DAY, JJ., and REDICK, District Judge.

PER CURIAM.

This is an action brought by plaintiff in the district court for Lancaster county by which she seeks to rescind a sale of stock to her by Lewis', a corporation, and a sale of stock by defendant Ronald F. Lewis individually. Defendant Lewis', a corporation, by cross-petition sought to recover from Ronald F. Lewis and Louise Menzendorf Lewis a sum alleged to have been embezzled by them. From an adverse judgment Ronald F. Lewis and Louise Menzendorf Lewis have appealed.

We have carefully considered the record and find that the same is without prejudicial error. The judgment of the district court is, therefore,

AFFIRMED.

THOMAS H. BARNES ET AL., APPELLEES, V. EARL C. BARKER, APPELLANT.

FILED OCTOBER 11, 1929. No. 26781.

APPEAL from the district court for Box Butte county: EARL L. MEYER, JUDGE. *Affirmed.*

R. O. Reddish and *Kinsinger & Ogden*, for appellant.

Lee Basye and *T. F. Neighbors, contra.*

Heard before GOSS, C. J., DEAN, GOOD, THOMPSON, EBERLY and DAY, JJ., and REDICK, District Judge.

PER CURIAM.

This is an action upon a contract for the sale of real estate whereby plaintiffs seek a foreclosure of the contract as a mortgage. Defendant prayed for specific performance and for damages occasioned by the breach thereof. From

the judgment of the district court of Box Butte county defendant Earl C. Barker has appealed and plaintiffs have prosecuted a cross-appeal.

We have carefully considered the alleged errors assigned both on the appeal and the cross-appeal. We find the record to be free from prejudicial error. The judgment of the district court is, therefore,

AFFIRMED.

MABEL COOLMAN, APPELLANT, V. THEODORE L. AMICK ET AL., APPELLEES.

FILED OCTOBER 11, 1929. No. 26782.

APPEAL from the district court for Cass county: JAMES T. BEGLEY, JUDGE. *Affirmed.*

Benjamin S. Baker and *Lower & Sheehan,* for appellant.

William R. Patrick, A. P. Moran and *D. O. Dwyer, contra.*

Heard before GOSS, C. J., DEAN, GOOD, THOMPSON, EBERLY and DAY, JJ., and REDICK, District Judge.

PER CURIAM.

This is an action begun by plaintiff in the district court for Cass county by which she sought specific performance of an alleged oral contract between herself and her grandmother, now deceased. Plaintiff alleges that she was to receive certain real estate situated in Cass county as consideration for her services in caring for her grandmother. The district court denied the petition of plaintiff and sustained the cross-petition of defendant Theodore L. Amick. Plaintiff has appealed.

We have carefully considered the record and find the same is without prejudicial error. The judgment of the district court is, therefore,

AFFIRMED.

IN RE ESTATE OF GUSTAF CARLSON.
ERIC A. NELSON, APPELLEE, V. AUGUSTA VICTORIA CARLSON, APPELLANT.

FILED OCTOBER 25, 1929. No. 26802.

APPEAL from the district court for Dawson county: ISAAC J. NISLEY, JUDGE. AFFIRMED.

F. J. Byrd and *Cook & Cook*, for appellant.

Milton C. Murphy, William A. Stewart and *Halligan, Beatty & Halligan, contra.*

Heard before GOSS, C. J., DEAN, GOOD, THOMPSON, EBERLY and DAY, JJ., and REDICK, District Judge.

PER CURIAM.

This is an appeal by Augusta Victoria Carlson, residuary legatee under the will of Gustaf Carlson, deceased, from a decree of the district court for Dawson county construing the will.

We have carefully considered the record and all briefs filed, and find that the record is free from prejudicial error. The judgment of the district court is therefore

AFFIRMED.

PRUDENTIAL INSURANCE COMPANY, APPELLEE, V. WIRT SEDGLEY ET AL., APPELLEES: ANTHONY J. STEPHENS, APPELLANT.

FILED OCTOBER 25, 1929. No. 26803.

APPEAL from the district court for Douglas county: IRVIN A. STALMASTER, JUDGE. *Affirmed.*

Charles W. Haller, for appellant.

T. B. Dysart, Stanley W. Cheff and *Brogan, Ellick & Raymond, contra.*

Heard before GOSS, C. J., DEAN, GOOD, THOMPSON, EBERLY and DAY, JJ.

PER CURIAM.

This is an appeal by Anthony J. Stephens from a decree

of foreclosure of a real estate mortgage by which appellee, Prudential Insurance Company of America, was given a first lien upon the property. The interest of Anthony J. Stephens and Bessie Stephens arises out of a contract of purchase.

We have carefully considered the record and find it to be without prejudicial error. The judgment of the district court is therefore

AFFIRMED.

ALICE MUSSACK, APPELLANT, V. ESTATE OF PEARL B. GORDON, APPELLEE.

FILED OCTOBER 25, 1929. No. 26805.

APPEAL from the district court for Burt county: WILLIAM G. HASTINGS, JUDGE. *Affirmed.*

W. M. Hopewell and *J. A. Singhaus,* for appellant.

George B. Thummel and *Orville L. Chatt, contra.*

Heard before GOSS, C. J., DEAN, GOOD, THOMPSON, EBERLY and DAY, JJ.

PER CURIAM.

This is an action by Alice Mussack against the estate of Pearl B. Gordon, based on an alleged oral promise of the deceased to pay her for living in the Gordon home "as a member of his family during his lifetime." The county court rejected the claims as barred by the statute of limitations. On appeal to the district court for Burt county the action was dismissed.

We have carefully considered the record and find the same to be without prejudicial error. The judgment is therefore

AFFIRMED.

OKEY SHINAFELT V. STATE OF NEBRASKA.

FILED OCTOBER 25, 1929. No. 27019.

ERROR to the district court for Hayes county: CHARLES E. ELDRED, JUDGE. *Affirmed.*

C. D. Ritchie, for plaintiff in error.

C. A. Sorensen, Attorney General, and *Clifford L. Rein, contra.*

Heard before GOSS, C. J., ROSE, DEAN, GOOD, THOMPSON, EBERLY and DAY, JJ., and REDICK, District Judge.

PER CURIAM.

This is a proceeding in error brought to this court by Okey Shinafelt for a review of the judgment of the district court for Hayes county, wherein he was convicted of the crime of rape.

We have carefully considered the record and find no prejudicial error. The judgment of the district court is therefore

AFFIRMED.

WALTER W. SHINAFELT V. STATE OF NEBRASKA.

FILED OCTOBER 25, 1929. No. 27020.

ERROR to the district court for Hayes county: CHARLES E. ELDRED, JUDGE. *Affirmed.*

C. D. Ritchie, for plaintiff in error.

C. A. Sorensen, Attorney General, and *Clifford L. Rein, contra.*

Heard before GOSS, C. J., ROSE, DEAN, GOOD, THOMPSON, EBERLY and DAY, JJ., and REDICK, District Judge.

PER CURIAM.

This is a proceeding in error brought to this court by Walter W. Shinafelt for a review of the judgment of the district court for Hayes county, wherein he was convicted of the crime of rape.

We have carefully considered the record and find no prejudicial error. The judgment of the district court is therefore

AFFIRMED.

ELMER BODEMAN V. STATE OF NEBRASKA.

FILED OCTOBER 25, 1929. No. 27021.

ERROR to the district court for Hayes county: CHARLES E. ELDRED, JUDGE. *Affirmed.*

C. D. Ritchie, for plaintiff in error.

C. A. Sorensen, Attorney General, and *Clifford L. Rein, contra.*

Heard before GOSS, C. J., ROSE, DEAN, GOOD, THOMPSON, EBERLY and DAY, JJ., and REDICK, District Judge.

PER CURIAM.

This is a proceeding in error brought to this court by Elmer Bodeman for a review of the judgment of the district court for Hayes county, wherein he was convicted of an assault with intent to commit rape.

We have carefully considered the record and find no prejudicial error. The judgment of the district court is therefore

AFFIRMED.

IN RE ESTATE OF NANCY JANE MCCABE.
IDA C. JONES, APPELLANT, V. GRANT MCCABE ET AL., APPELLEES.

FILED NOVEMBER 8, 1929. No. 26663.

APPEAL from the district court for Thayer county: ROBERT M. PROUDFIT, JUDGE. *Affirmed.*

J. P. Baldwin and *J. L. Richards,* for appellant.

W. E. Goodhue, Heasty, Barnes & Rain, Hoagland & Carr and *Harvey W. Hess, contra.*

Heard before GOSS, C. J., ROSE, DEAN, GOOD, THOMPSON, EBERLY and DAY, JJ.

PER CURIAM.

This is an appeal by Ida C. Jones, proponent of the will of Nancy Jane McCabe, from a judgment of the district court for Thayer county denying admission of the will to probate.

We have carefully considered the record and briefs filed and find that the record is without prejudicial error. The judgment of the district court is therefore

AFFIRMED.

ROSE E. KIRBY, APPELLEE, V. J. B. THOMES, APPELLANT.

FILED NOVEMBER 8, 1929. No. 26906.

APPEAL from the district court for Saunders county: HARRY D. LANDIS, JUDGE. *Affirmed.*

Slama & Donato and *J. F. Berggren,* for appellant.

Cook & Gumb and *J. H. Barry, contra.*

Heard before GOSS, C. J., DEAN, EBERLY and DAY, JJ., and RHOADES, SPEAR and TEWELL, District Judges.

PER CURIAM.

This is an action to recover damages for injuries sustained as the result of an automobile collision. From a judgment of the district court for Saunders county in favor of plaintiff, defendant has appealed.

We have carefully considered the record and find it to be free from prejudicial error. The judgment of the district court is therefore

AFFIRMED.

HERBERT R. SPARKS ET AL. V. STATE OF NEBRASKA.

FILED NOVEMBER 8, 1929. No. 26992.

ERROR to the district court for Franklin county: LEWIS H. BLACKLEDGE, JUDGE. *Affirmed.*

George Losey and *Bernard McNeny*, for plaintiff in error.

C. A. Sorensen, Attorney General, and *Leon Samuelson, contra.*

Heard before GOSS, C. J., ROSE, DEAN, GOOD, THOMPSON, EBERLY and DAY, JJ.

PER CURIAM.

This is a proceeding in error brought to this court by Dan Reams for a review of the judgment of the district court for Franklin county wherein he and one Herbert R. Sparks were convicted of the crime of hog stealing.

We have carefully considered all alleged errors assigned by plaintiff in error and find no prejudicial error in the record. The judgment of the district court is therefore

AFFIRMED.

A. P. BRESSLER, APPELLEE, V. BOARD OF EDUCATION OF SCHOOL DISTRICT OF SCOTTSBLUFF, APPELLANT.

FILED NOVEMBER 14, 1929. No. 26688.

APPEAL from the district court for Scotts Bluff county: EDWARD F. CARTER, JUDGE. *Affirmed.*

Mothersead & York, for appellant.

Raymond & Fitzgerald, contra.

Heard before GOSS, C. J., ROSE, DEAN, GOOD, THOMPSON, EBERLY and DAY, JJ.

PER CURIAM.

This is an action to recover a balance alleged to be due on a contract for the erection of a school building. From a judgment in favor of plaintiff, rendered by the district court for Scotts Bluff county, defendant has appealed.

Oral argument was had before the supreme court commission on March 18, 1929, but no opinion was adopted. Later, on the court's own motion, the cause was reargued before the court.

We have carefully considered the record and find the

same to be free from prejudicial error. The judgment of the district court is therefore

AFFIRMED.

JAMES E. RAIL, APPELLANT, V. UNION STOCK-YARDS COMPANY OF OMAHA, APPELLEE.

FILED NOVEMBER 14, 1929. No. 26798.

APPEAL from the district court for Douglas county: JAMES M. FITZGERALD, JUDGE. *Affirmed.*

Rose, Wells, Martin & Lane and *Lawrence W. Rice,* for appellant.

Kennedy, Holland, De Lacy & McLaughlin, contra.

Heard before GOSS, C. J., DEAN, GOOD, and EBERLY, JJ., and RHOADES, SPEAR and TEWELL, District Judges.

PER CURIAM.

This action was begun in the district court for Douglas county to recover damages for personal injuries sustained by plaintiff while in the defendant's stock-yards at Omaha, Nebraska. At the close of all the testimony the trial court, upon motion, directed a verdict for defendant. Plaintiff has appealed.

We have carefully considered the record and find it to be without prejudicial error. The judgment of the district court is therefore

AFFIRMED.

N. M. SOMMERVILLE, APPELLANT, V. COUNTY BOARD OF EQUALIZATION OF LANCASTER COUNTY, APPELLEE.

FILED NOVEMBER 14, 1929. No. 26869.

APPEAL from the district court for Lancaster county: WILLARD E. STEWART, JUDGE. *Affirmed.*

N. M. Sommerville, pro se.

Max Towle and *Farley Young, contra.*

Heard before GOSS, C. J., DEAN, GOOD and EBERLY, JJ., and RHOADES, SPEAR and TEWELL, District Judges.

PER CURIAM.

This is an appeal by N. M. Sommerville from a judgment of the district court for Lancaster county sustaining a demurrer to his petition. By this action petitioner complained of the assessments made by the taxing authorities of Lancaster county against banks and trust companies.

We have carefully considered the record herein and find the trial court did not err in sustaining the demurrer. The judgment of the district court is therefore

AFFIRMED.

ELLEN S. ROWE, APPELLEE, V. WILLIAM RICE ET AL., APPELLANTS.

FILED NOVEMBER 14, 1929. No. 26905.

APPEAL from the district court for Morrill county: EDWARD F. CARTER, JUDGE. *Affirmed.*

Mitchell & Gantz and *T. F. Neighbors*, for appellants.

R. O. Canaday, contra.

Heard before GOSS, C. J., DEAN, GOOD and EBERLY, JJ., and RHOADES, SPEAR and TEWELL, District Judges.

PER CURIAM.

This is an action in ejectment begun in the district court for Morrill county. The jury returned a verdict in favor of plaintiff, and from a judgment entered thereon, defendants have appealed.

We have carefully considered the record and briefs filed herein and find that the record is without prejudicial error. The judgment of the district court is therefore

AFFIRMED.

HARTFORD D. REED V. STATE OF NEBRASKA.

FILED NOVEMBER 22, 1929. No. 26861.

ERROR to the district court for Lancaster county: WILLARD E. STEWART, JUDGE. *Affirmed.*

J. A. Hayward and *H. C. Lowe,* for plaintiff in error.

C. A. Sorensen, Attorney General, and *Homer L. Kyle, contra.*

Heard before GOSS, C. J., ROSE, GOOD, THOMPSON, EBERLY and DAY, JJ., and THOMSEN, District Judge.

PER CURIAM.

Hartford D. Reed, plaintiff in error in this proceeding, was charged by the county attorney of Lancaster county with having committed an assault. Upon a plea of guilty Reed was sentenced on the 5th of December, 1927, to a term of five years in the state penitentiary. On the 9th of November, 1928, Reed commenced this action by filing a motion for a writ of error *coram nobis,* alleging that his plea of guilty had been procured by fraud and duress. The district court for Lancaster county dismissed the proceeding and the case is brought to this court on error.

We have carefully considered the record and find the same to be without prejudicial error. The judgment of the district court is therefore

AFFIRMED.

R. O. BROWNELL, RECEIVER, APPELLEE, V. ROSCOE E. SCHINDEL, APPELLANT.

FILED NOVEMBER 22, 1929. No. 26878.

APPEAL from the district court for Douglas county: ALEXANDER C. TROUP, JUDGE. *Affirmed.*

A. H. Murdock, J. E. Bednar and *Perry Wheeler,* for appellant.

Gaines, McGilton, Van Orsdel and *Gaines, contra.*

Heard before GOSS, C. J., ROSE, DEAN, GOOD, THOMPSON, EBERLY and DAY, JJ.

PER CURIAM.

This is an action brought by plaintiff as receiver of the Security State Bank of Omaha to recover on the alleged double liability of defendant as a stockholder in the insolvent bank. The trial court directed a verdict in favor of plaintiff. Defendant has appealed.

We have carefully considered the record and find the same to be without prejudicial error. The judgment of the district court is therefore

AFFIRMED.

STATE, EX REL. IDA BROTHERTON, APPELLEE, V. ERNEST GIESE, APPELLANT.

FILED NOVEMBER 22, 1929. No. 26934.

APPEAL from the district court for Dakota county: MARK J. RYAN, JUDGE. *Affirmed.*

William P. Warner, for appellant.

James J. McCarthy and *Malcolm R. Smith, contra.*

Heard before GOSS, C. J., ROSE, GOOD, THOMPSON, EBERLY and DAY, JJ., and THOMSEN, District Judge.

PER CURIAM.

This is an action in bastardy. The district court for Dakota county rendered judgment in favor of plaintiff for $1,000 and costs. Defendant has appealed.

We have carefully considered the record and find the same to be without prejudicial error. The judgment of the district court is therefore

AFFIRMED.

MIKE S. ABDALLA, APPELLEE and CROSS-APPELLANT, V. MERCHANTS MUTUAL BURGLARY INSURANCE COMPANY, APPELLANT AND CROSS-APPELLEE.

FILED NOVEMBER 22, 1929. No. 26938.

APPEAL from the district court for Holt county: ROBERT R. DICKSON, JUDGE. *Affirmed.*

Howell, Tunison & Joyner and *Julius D. Cronin,* for appellant.

J. A. Donohoe, contra.

Heard before GOSS, C. J., ROSE, GOOD, THOMPSON, EBERLY and DAY, JJ., and THOMSEN, District Judge.

PER CURIAM.

This is an action on a burglary insurance policy issued to plaintiff by the defendant company. From a judgment of the district court for Holt county in favor of plaintiff, defendant has appealed.

We have carefully considered the record and find the same to be without prejudicial error. The judgment of the district court is therefore

AFFIRMED.

EDNA P. NEELY, APPELLEE, V. CITY OF LINCOLN ET AL., APPELLANTS.

FILED DECEMBER 10, 1929. No. 26737.

APPEAL from the district court for Lancaster county: MASON WHEELER, JUDGE. *Affirmed.*

Frank A. Peterson and *Lloyd Chapman,* for appellants.

Allen & Requartte, contra.

Heard before GOSS, C. J., ROSE, DEAN, GOOD and EBERLY, JJ., and REDICK and STEWART, District Judges.

PER CURIAM.

This is an appeal by the city of Lincoln from an order of the district court for Lancaster county reducing the amount

of paving assessment on the appellee's property.

The record has been carefully examined and is found to be free from prejudicial error. The judgment of the district court is therefore

AFFIRMED.

MARY B. BRYAN, EXECUTRIX, APPELLEE, V. CITY OF LINCOLN ET AL., APPELLANTS.

FILED DECEMBER 10, 1929. No. 26738.

APPEAL from the district court for Lancaster county: MASON WHEELER, JUDGE. *Affirmed.*

Frank A. Peterson and *Lloyd Chapman*, for appellants.

Allen & Requartte, contra.

Heard before GOSS, C. J., ROSE, DEAN, GOOD and EBERLY, JJ., and REDICK and STEWART, District Judges.

PER CURIAM.

This is an appeal by the city of Lincoln from an order of the district court for Lancaster county reducing the amount of paving assessment on the appellee's property.

The record has been carefully examined and is found to be free from prejudicial error. The judgment of the district court is therefore

AFFIRMED.

RIVETT LUMBER & COAL COMPANY, APPELLANT, V. ANTON P. LINDER ET AL., APPELLEES.

FILED DECEMBER 12, 1929. No. 26946.

APPEAL from the district court for Douglas county: WILLIAM G. HASTINGS, JUDGE. *Affirmed.*

Brome, Thomas, Ramsey & McGuire, for appellant.

A. H. Bigelow and *Sidney W. Smith, contra.*

Heard before GOSS, C. J., ROSE, DEAN, GOOD, THOMPSON and DAY, JJ., and THOMSEN, District Judge.

PER CURIAM.

This is an action in equity to foreclose a mechanics' lien. This case has heretofore been before this court; the first opinion being *Rivett Lumber & Coal Co. v. Linder*, 113 Neb. 567, and the second, bearing the same title, is reported in 116 Neb. 463. In the instant case plaintiff has appealed from an order of the district court for Douglas county directing distribution of the proceeds of sheriff's sale.

We have carefully considered the record and find the same free from prejudicial error. The judgment of the district court is therefore

AFFIRMED.

JACK PALMER V. STATE OF NEBRASKA.

FILED DECEMBER 12, 1929. No. 26956.

ERROR to the district court for Adams county: J. W. JAMES, JUDGE. *Affirmed.*

F. L. Carrico, for plaintiff in error.

C. A. Sorensen, Attorney General, and *Homer L. Kyle, contra.*

Heard before GOSS, C. J., ROSE, GOOD, THOMPSON, EBERLY and DAY, JJ., and THOMSEN, District Judge.

PER CURIAM.

This is a proceeding in error brought to this court by Jack Palmer for a review of the judgment of the district court for Adams county wherein he was convicted of the crime of chicken stealing.

We have carefully considered all alleged errors assigned by plaintiff in error and find that the record is free from prejudicial error. The judgment of the district court is therefore

AFFIRMED.

ELSIE BENNER, APPELLEE, V. EVANS LAUNDRY COMPANY, APPELLANT.

FILED DECEMBER 12, 1929. No. 27059.

APPEAL from the district court for Lancaster county: JEFFERSON H. BROADY, JUDGE. *Affirmed.*

James Kinsinger, Warren Ogden and *H. W. Baird,* for appellant.

Wilmer B. Comstock and *John H. Comstock, contra.*

Heard before GOSS, C. J., ROSE, DEAN, GOOD, THOMPSON and DAY, JJ., and THOMSEN, District Judge.

PER CURIAM.

This action was commenced in the district court for Lancaster county by Elsie Benner, a minor, to recover for injuries sustained while in the employ of defendant company. The jury found for plaintiff in the sum of $12,000, and from a judgment entered thereon defendant has appealed.

We have carefully considered the record and find the same to be free from prejudicial error. The judgment of the district court is therefore

AFFIRMED.

CASES DETERMINED

IN THE

SUPREME COURT OF NEBRASKA

JANUARY TERM, 1930.

IN RE ESTATE OF LOUIS BOURK.
CONDIT & COMPANY ET AL., APPELLEES, V. L. J. ROCHFORD, ADMINISTRATOR, APPELLANT.

FILED JANUARY 8, 1930. No. 26952.

APPEAL from the district court for Saunders county: HARRY D. LANDIS, JUDGE. *Affirmed.*

J. H. Barry and *J. M. Galloway*, for appellant.

Hendricks & Kokjer, contra.

Heard before ROSE, DEAN, GOOD, THOMPSON, EBERLY and DAY, JJ., and FOSTER, District Judge.

PER CURIAM.

This is an appeal by L. J. Rochford from an order of the district court for Saunders county directing him, as administrator with the will annexed, of the estate of Louis Bourk, deceased, to pay a balance claimed to be due creditors.

We have carefully examined the record and find it to be free from prejudicial error. The judgment of the district court is therefore

AFFIRMED.

GERTRUDE GATES, APPELLEE, V. HOSTETLER AMUSEMENT COMPANY ET AL., APPELLANTS.

FILED JANUARY 8, 1930. No. 26957.

APPEAL from the district court for Hall county: EDWIN P. CLEMENTS, JUDGE. *Affirmed.*

Horth, Cleary & Suhr and *Eugene N. Blazer*, for appellants.

William P. Mullen, contra.

Heard before GOSS, C. J., ROSE, DEAN, GOOD, THOMPSON, EBERLY and DAY, JJ., and FOSTER, District Judge.

PER CURIAM.

Plaintiff, a negress, brought this action in the district court for Hall county to recover damages for humiliation caused her by reason of being forced to leave the theater operated by defendants in the city of Grand Island. The jury returned a verdict for plaintiff in the sum of $200.50. From a judgment entered thereon defendants have appealed.

We have carefully examined the record and find it to be free from prejudicial error. The judgment of the district court is therefore

AFFIRMED.

THOMPSON, J., not participating.

CARL CARLSON, APPELLEE, V. MILAN S. MOORE, APPELLANT.

FILED JANUARY 8, 1930. No. 26963.

APPEAL from the district court for Dawson county: ISAAC J. NISLEY, JUDGE. *Affirmed.*

H. A. Bryant and *Stewart & Stewart*, for appellant.

Halligan, Beatty & Halligan, contra.

Heard before ROSE, DEAN, GOOD, THOMPSON, EBERLY and DAY, JJ., and FOSTER, District Judge.

PER CURIAM.

This is an action to recover damages for malpractice, in which plaintiff alleged that defendant was careless and negligent in the operation of an X-ray used in treatment for the cure of eczema. The jury found for plaintiff in the sum of $4,175, and from a judgment entered thereon by the district court for Dawson county, defendant has appealed.

We have carefully examined the record and find it to be free from prejudicial error. The judgment of the district court is therefore

AFFIRMED.

JOHN GABARRON, APPELLEE, V. SULLIVAN TRANSFER & STORAGE COMPANY, APPELLANT.

FILED JANUARY 8, 1930. No. 26966.

APPEAL from the district court for Lancaster county: JEFFERSON H. BROADY, JUDGE. *Affirmed.*

L. R. Doyle, Claude S. Wilson, R. F. Gilkeson, Hymen Rosenberg and *Baylor & Tou Velle,* for appellant.

Hainer, Flansburg & Lee and *John O. Sheldahl, contra.*

Heard before ROSE, DEAN, GOOD, THOMPSON, EBERLY and DAY, JJ., and FOSTER, District Judge.

PER CURIAM.

This is an action for damages for personal injuries sustained by plaintiff as the result of an automobile accident. From a verdict and judgment for $7,500 in favor of plaintiff, defendant has appealed.

We have carefully examined the record and find it to be free from prejudicial error. The judgment of the district court is therefore

AFFIRMED.

LEWIS LINEBAUGH, ADMINISTRATOR, APPELLANT, V. UNION PACIFIC RAILROAD COMPANY ET AL., APPELLEES.

FILED JANUARY 8, 1930. No. 26976.

APPEAL from the district court for Saunders county: HARRY D. LANDIS, JUDGE. *Affirmed.*

Slama & Donato, E. S. Schiefelbein and *A. J. Rhodes,* for appellant.

C. A. Magaw, Thomas W. Bockes, J. H. Barry and *Thomas F. Hamer, contra.*

Heard before GOSS, C. J., GOOD, THOMPSON, EBERLY and DAY, JJ., and FOSTER and SHEPHERD, District Judges.

PER CURIAM.

This action is brought by plaintiff, as administrator of the estate of Orval R. Wagner, deceased, the driver of a truck, who was struck by an oil train operated by defendant company. At the conclusion of plaintiff's evidence, the district court for Saunders county sustained defendants' motion for a directed verdict. Plaintiff appealed.

We have carefully examined the record and find it to be free from prejudicial error. The judgment of the district court is therefore

AFFIRMED.

STATE, EX REL. O. S. SPILLMAN, ATTORNEY GENERAL, V. FARMERS BANK OF CRAWFORD, APPELLANT: FRED R. LEITHOFF, APPELLEE.

FILED JANUARY 8, 1930. No. 26980.

APPEAL from the district court for Dawes county: EARL L. MEYER, JUDGE. *Affirmed.*

C. M. Skiles, I. D. Beynon, Albert S. Johnston and *Allen G. Fisher,* for appellant.

E. D. Crites and *F. A. Crites, contra.*

Heard before GOSS, C. J., GOOD, THOMPSON, EBERLY and DAY, JJ., and FOSTER and SHEPHERD, District Judges.

PER CURIAM.

This is an appeal from an order of the district court for Dawes county allowing the deposit of Fred R. Leithoff as a claim against the guaranty fund.

We have carefully examined the record and find it to be free from prejudicial error. The judgment of the district court is therefore

AFFIRMED.

STATE, EX REL. O. S. SPILLMAN, ATTORNEY GENERAL, V. DANNEBROG STATE BANK, APPELLANT: H. P. PETERSEN, APPELLEE.

FILED JANUARY 8, 1930. No. 26981.

APPEAL from the district court for Howard county: EDWIN P. CLEMENTS, JUDGE. *Affirmed.*

C. M. Skiles, Taylor & Spikes and *Beller & James,* for appellant.

Haggart & Haggart, contra.

Heard before ROSE, DEAN, GOOD, THOMPSON, EBERLY and DAY, JJ., and FOSTER, District Judge.

PER CURIAM.

H. P. Petersen, appellee herein, filed a claim in the receivership proceedings brought to wind up the affairs of the Dannebrog State bank, based on two certificates of deposit in the amounts of $1,666.67 and $2,500, respectively. The district court for Howard county found the $1,666.67 item to be a general claim and the $2,500 item to be a preferred claim and allowed both as an off-set against a $7,000 note of Petersen and entered judgment in favor of the receiver of the Dannebrog State Bank and against Petersen for $4,384.66. The receiver has appealed.

We have carefully examined the record and find it to be free from prejudicial error. The judgment of the district court is therefore

AFFIRMED.

GEORGE J. ADAMS ET AL., APPELLANTS, V. JOHN ARMOUR, COUNTY CLERK, ET AL., APPELLEES.

FILED JANUARY 8, 1930. No. 27220.

APPEAL from the district court for Logan county: BRUNO O. HOSTETLER, JUDGE. *Affirmed.*

W. E. Hill, N. P. McDonald and *Beeler, Crosby & Baskins,* for appellants.

Hoagland & Carr, H. E. Dress and *D. A. Russell, contra.*

Heard before GOSS, C. J., ROSE, DEAN, GOOD, EBERLY and DAY, JJ., and DINEEN, District Judge.

PER CURIAM.

This action was brought by a group of electors of Logan county to contest an election at which it was voted to remove the county seat of said county from the village of Gandy to the village of Stapleton. The trial court found generally in favor of the validity of the election and dismissed the contest. Complainants have appealed.

We have carefully considered the record and find it to be free from prejudicial error. The judgment of the district court is therefore

AFFIRMED.

HARVEY KUNSELMAN V. STATE OF NEBRASKA.

FILED JANUARY 15, 1930. No. 26948.

ERROR to the district court for Adams county: J. W. JAMES, JUDGE. *Affirmed.*

J. E. Willits, for plaintiff in error.

C. A. Sorensen, Attorney General, and *Clifford L. Rein, contra.*

Heard before GOSS, C. J., ROSE, DEAN, GOOD, EBERLY and DAY, JJ., and DINEEN, District Judge.

PER CURIAM.

This is a proceeding in error brought to this court by Harvey Kunselman for a review of the judgment of the district court for Adams county wherein he was convicted of the crime of burglary.

We have carefully considered the record and find the same to be free from prejudicial error. The judgment of the district court is therefore

AFFIRMED.

RAYMOND BOHLKE V. STATE OF NEBRASKA.

FILED JANUARY 15, 1930. No. 26949.

ERROR to the district court for Adams county: J. W. JAMES, JUDGE. *Affirmed.*

J. E. Willits, for plaintiff in error.

C. A. Sorensen, Attorney General, and *Clifford L. Rein, contra.*

Heard before GOSS, C. J., ROSE, DEAN, GOOD, EBERLY and DAY, JJ., and DINEEN, District Judge.

PER CURIAM.

This is a proceeding in error brought to this court by Raymond Bohlke for a review of the judgment of the district court for Adams county wherein he was convicted of the crime of burglary.

We have carefully considered the record and find the same to be free from prejudicial error. The judgment of the district court is therefore

AFFIRMED.

NENA A. SCOTT, APPELLANT, V. FRED F. SCOTT, APPELLEE.

FILED JANUARY 15, 1930. No. 27005.

APPEAL from the district court for Douglas county: ALEXANDER C. TROUP, JUDGE. *Affirmed.*

Anson H. Bigelow, for appellant.

Abbott, Dunlap & Corbett, contra.

Heard before GOSS, C. J., ROSE, DEAN, GOOD, EBERLY and DAY, JJ., and DINEEN, District Judge.

PER CURIAM.

This is an action to recover money damages for the alleged fraud of defendant in procuring a decree of divorce from plaintiff. The district court for Douglas county sustained a special appearance of defendant and plaintiff has appealed.

We have carefully examined the record and find the same

to be free from prejudicial error. The judgment of the district court is therefore

AFFIRMED.

IN RE ESTATE OF ANE MARIE NIELSEN.
DEWEY NIELSEN, APPELLANT, V. MARIE GUTZMER ET AL., APPELLEES.

FILED JANUARY 15, 1930. No. 27012.

APPEAL from the district court for Douglas county: ALEXANDER C. TROUP, JUDGE. *Affirmed.*

Gaines, McGilton, Van Orsdel & Gaines for appellant.

John A. McKenzie and *Lawrence Fredericksen, contra.*

Heard before GOSS, C. J., ROSE, DEAN, GOOD, EBERLY and DAY, JJ., and DINEEN, District Judge.

PER CURIAM.

This is an action brought by three children of Ane Marie Nielsen, deceased, to set aside the will of their mother on the ground that at the time of the execution of the instrument testatrix was mentally incompetent and because of the alleged undue influence of another son, Dewey Nielsen. The county court admitted the will to probate and an appeal was taken. Upon a trial in the district court for Douglas county the jury returned a verdict in favor of contestants, and from a judgment entered thereon proponent has appealed.

We have carefully considered the record and find the same to be free from prejudicial error. The judgment of the district court is therefore

AFFIRMED.

RUTH HANEY V. STATE OF NEBRASKA.

FILED JANUARY 15, 1930. No. 27084.

ERROR to the district court for Platte county: LOUIS LIGHTNER, JUDGE. *Affirmed as modified.*

Cranny & Moore, for plaintiff in error.

C. A. Sorensen, Attorney General, and *Irvin A. Stalmaster, contra.*

Heard before GOSS, C. J., DEAN, GOOD, THOMPSON, EBERLY and DAY, JJ., and DINEEN, District Judge.

PER CURIAM.

This is a proceeding in error brought to this court by Ruth Haney for a review of the judgment of the district court for Platte county wherein she was convicted of the crime of burglary and sentenced to serve a period of one year in the state penitentiary.

We have carefully considered the record and find no ground for reversal. We believe, however, that this is an instance where the judgment of the district court may properly be modified.

Under the provisions of section 10186, Comp. St. 1922, the judgment of the district court is modified to the extent that the penalty imposed is changed from one year in the state penitentiary to five months in the county jail of Platte county. As thus modified, the judgment is affirmed.

AFFIRMED AS MODIFIED.

DELL JARMIN ET AL., APPELLEES, V. CHARLES A. BESSIE, APPELLANT.

FILED JANUARY 30, 1930. No. 26902.

APPEAL from the district court for Buffalo county: BRUNO O. HOSTETLER, JUDGE. *Affirmed.*

Drake & Drake, for appellant.

Harvey M. Wilson, contra.

Heard before GOSS, C. J., ROSE, DEAN, GOOD, THOMPSON, EBERLY and DAY, JJ.

PER CURIAM.

This is an action to recover for a quantity of hay alleged to have been sold and delivered by plaintiffs to defendant. Upon a trial in the district court for Buffalo county a verdict was rendered in favor of plaintiffs, and from a judgment entered thereon defendant has appealed.

We have carefully examined the record and find it to be free from prejudicial error. The judgment of the district court is therefore

AFFIRMED.

CITIZENS STATE BANK OF GENEVA, APPELLANT, V. WALTER V. HUSTON ET AL., APPELLEES.
CITIZENS STATE BANK OF GENEVA, APPELLANT, V. BERT A. LYNN, GUARDIAN, ET AL., APPELLEES.

FILED JANUARY 30, 1930. No. 26986.

APPEAL from the district court for Fillmore county: ROBERT M. PROUDFIT, JUDGE. *Affirmed.*

Tibbets, Lambe & Hewitt, for appellant.

Waring & Waring, Sloans, Keenan & Corbitt and *Montgomery, Hall, Young & Johnsen, contra.*

Heard before GOSS, C. J., ROSE, DEAN, GOOD, THOMPSON, and EBERLY, JJ., and LANDIS, District Judge.

PER CURIAM.

This is an appeal from a decree of the district court for Fillmore county dismissing two suits brought by plaintiff to recover certain notes alleged to have been wrongfully transferred by the managing officer of plaintiff bank to two estates which he represented. The two suits were consolidated in the district court.

We have carefully examined the record and find the same to be free from prejudicial error. The judgment of the district court is therefore

AFFIRMED.

ERVIN LACOMA, APPELLEE, V. WESTERN UNION TELEGRAPH COMPANY, APPELLANT.

FILED JANUARY 30, 1930. No. 27244.

APPEAL from the district court for Douglas county: WILLIAM G. HASTINGS, JUDGE. *Affirmed.*

Brogan, Ellick & Raymond and *James J. Fitzgerald, Jr.*, for appellant.

E. R. Leigh, contra.

Heard before GOSS, C. J., ROSE, GOOD, THOMPSON, EBERLY and DAY, JJ., and LANDIS, District Judge.

PER CURIAM.

This is an action under the workmen's compensation act to recover for an injury to plaintiff's knee suffered while employed as a "route clerk". The trial court found that the injury arose out of and in the course of plaintiff's employment and was compensable. Plaintiff was awarded the sum of $124.57 together with medical and hospital bills and an attorney fee. Defendant has appealed.

We have carefully examined the record and find the same free from prejudicial error. The judgment of the district court is therefore affirmed and plaintiff allowed the sum of $100 as attorney fee for services in this court; same to be taxed as costs.

AFFIRMED.

JOHN W. GETCHELL, ADMINISTRATOR, APPELLANT, V. WINFIELD S. RODMAN ET AL., APPELLEES.

FILED FEBRUARY 7, 1930. No. 27024.

APPEAL from the district court for Kimball county: ISAAC J. NISLEY, JUDGE. *Affirmed.*

Allen G. Fisher, Charles A. Fisher and *F. S. Baker*, for appellant.

Roland V. Rodman, Harvey M. Johnsen and *Brown, Fitch & West, contra.*

Heard before GOSS, C. J., DEAN, GOOD, EBERLY and DAY, JJ., and PAINE, District Judge.

PER CURIAM.

This is an action based upon a promissory note executed by defendant Rodman and delivered to John W. Getchell,

Sr. The district court for Kimball county found in favor of defendants and plaintiff has appealed.

We have carefully examined the record and find it to be free from prejudicial error. The judgment of the district court is therefore

AFFIRMED.

JOHN W. GETCHELL, ADMINISTRATOR, APPELLANT, V. WINFIELD S. RODMAN, APPELLEE.

FILED FEBRUARY 7, 1930. No. 27025.

APPEAL from the district court for Kimball county: ISAAC J. NISLEY, JUDGE. *Affirmed.*

Allen G. Fisher, Charles A. Fisher and *F. S. Baker*, for appellant.

Roland V. Rodman and *Harvey M. Johnsen, contra.*

Heard before GOSS, C. J., DEAN, GOOD, EBERLY and DAY, JJ., and PAINE, District Judge.

PER CURIAM.

This is an action based upon a promissory note executed by defendant Rodman and delivered to John W. Getchell, Sr. The district court for Kimball county found in favor of defendant and plaintiff has appealed.

We have carefully examined the record and find it to be free from prejudicial error. The judgment of the district court is therefore

AFFIRMED.

SOCIETE TITANOR, APPELLEE, V. SELDEN-BRECK CONSTRUCTION COMPANY, APPELLANT.

FILED FEBRUARY 7, 1930. No. 27027.

APPEAL from the district court for Douglas county: CHARLES LESLIE, JUDGE. *Affirmed.*

Kennedy, Holland, De Lacy & McLaughlin, for appellant.

Congdon, Finlayson & Burke, contra.

Heard before GOSS, C. J., DEAN, GOOD, EBERLY and DAY JJ., and PAINE, District Judge.

PER CURIAM.

This is an action on a written contract to recover for a quantity of tool steel sold by plaintiff to defendant. The district court for Douglas county sustained plaintiff's motion for a directed verdict and entered judgment against defendant for $2,113.54. Defendant has appealed.

We have carefully considered the record and find the same free from prejudicial error. The judgment of the district court is therefore

AFFIRMED.

MARY VLCEK ET AL., APPELLANTS, V. BURLINGTON ELEVATOR COMPANY ET AL., APPELLEES.

FILED FEBRUARY 7, 1930. No. 27037.

APPEAL from the district court for Douglas county: WILLIAM G. HASTINGS, JUDGE. *Affirmed.*

James J. Krajicek and *Votava & McGroarty*, for appellants.

Kennedy, Holland, De Lacy & McLaughlin and *John F. Moriarty, contra.*

Heard before GOSS, C. J., ROSE, DEAN, GOOD, THOMPSON, EBERLY and DAY, JJ.

PER CURIAM.

Plaintiffs brought this action to enjoin the erection of an elevator by defendant Burlington Elevator Company, and certain other industrial buildings by defendant Omaha Flour Mills. It is alleged that in 1924 the property upon which defendants proposed to erect such buildings was placed in what is known as a residential district under the terms of the city zoning ordinance, which ordinance was amended in 1929 to permit the property in question to be used for industrial purposes. A separate demurrer was filed on behalf of each defendant. The district court for Douglas county sustained the demurrers and plaintiffs have appealed.

We have carefully considered the record and find the same to be free from prejudicial error. The judgment of the district court is therefore

AFFIRMED.

ROBERT BROWNLEE, APPELLANT, V. SCHOOL DISTRICT OF LINCOLN, APPELLEE.

FILED FEBRUARY 7, 1930. No. 27040.

APPEAL from the district court for Lancaster county: JEFFERSON H. BROADY, JUDGE. *Affirmed.*

Sanden, Anderson, Laughlin & Gradwohl, for appellant.

R. O. Williams and *C. Petrus Peterson, contra.*

Heard before GOSS, C. J., DEAN, GOOD, EBERLY and DAY, JJ., and PAINE, District Judge.

PER CURIAM.

This is an action to recover damages for personal injuries sustained by Robert Brownlee, a minor, alleged to have been caused by the overturning of a disconnected steam radiator which stood in a hall of the Saratoga school building in the city of Lincoln. The defendant filed a general demurrer, which was sustained by the district court for Lancaster county. Plaintiff has appealed.

We have carefully examined the record and find it free from prejudicial error. The judgment of the district court is therefore

AFFIRMED.

NATIONAL AMERICAN FIRE INSURANCE COMPANY, APPELLANT, V. FRED SOPER ET AL., APPELLEES.

FILED FEBRUARY 14, 1930. No. 26991.

APPEAL from the district court for Nuckolls county: ROBERT M. PROUDFIT, JUDGE. *Affirmed.*

Ziegler & Dunn, G. W. Becker and *F. H. Stubbs,* for appellant.

J. W. Boyd, Bernard McNeny, T. W. Cole and *Stiner & Boslaugh, contra.*

Heard before GOSS, C. J., DEAN, GOOD, THOMPSON, EBERLY and DAY, JJ., and PAINE, District Judge.

PER CURIAM.

Plaintiff brought this action to foreclose its first mortgage upon certain premises owned in fee by defendant Lydia E. Soper. The defendant Hardy State Bank of Hardy held a second mortgage upon the same premises, which mortgage is set up by cross-petition. Defendants defaulted and a decree was entered foreclosing both mortgages. Defendants filed a request for stay. Later sale was had, at which the property was sold to plaintiff. Upon motion to confirm the sale, plaintiff filed objections to confirmation, alleging a misunderstanding as to the application of certain insurance money. The district court for Nuckolls county confirmed the sale over the objections of plaintiff. Plaintiff has appealed.

We have carefully examined the record and find it to be free from prejudicial error. The judgment of the district court is therefore

AFFIRMED.

THOMAS KASTNER, APPELLEE, V. CITY OF NEBRASKA CITY ET AL., APPELLANTS.

FILED FEBRUARY 14, 1930. No. 27029.

APPEAL from the district court for Otoe county: JAMES T. BEGLEY, JUDGE. *Affirmed.*

Thomas E. Dunbar, for appellants.

D. W. Livingston, contra.

Heard before GOSS, C. J., ROSE, DEAN, GOOD, EBERLY and DAY, JJ., and PAINE, District Judge.

PER CURIAM.

This is an action brought by plaintiff to enjoin the opening of certain streets in the city of Nebraska City which

plaintiff claimed by right of adverse possession. From a decree of the district court for Otoe county in favor of plaintiff, defendants have appealed.

We have carefully examined the record and find the same to be free from prejudicial error. The judgment of the district court is therefore

AFFIRMED.

KATE CRABLE ET AL. V. STATE OF NEBRASKA.

FILED FEBRUARY 14, 1930. No. 27089.

ERROR to the district court for Adams county: J. W. JAMES, JUDGE. *Affirmed.*

J. E. Willits, for plaintiffs in error.

C. A. Sorensen, Attorney General, and *Clifford L. Rein, contra.*

Heard before GOSS, C. J., ROSE, DEAN, GOOD, THOMPSON, EBERLY and DAY, JJ.

PER CURIAM.

This is a proceeding in error, brought to review the judgment of the district court for Adams county, wherein Kate Crable was convicted of sale, possession, and transportation of intoxicating liquor and the use of an automobile for transportation of intoxicating liquor, and Edward J. Crable was convicted of possession and transportation of intoxicating liquor and the use of an automobile for transportation of intoxicating liquor.

We have carefully examined the record and find it to be free from prejudicial error. The judgment of the district court is therefore

AFFIRMED.

TRUSCON STEEL COMPANY, APPELLANT, V. CRYSTAL REFRIGERATOR COMPANY, APPELLEE.

FILED FEBRUARY 14, 1930. No. 27166.

APPEAL from the district court for Dodge county: FREDERICK L. SPEAR, JUDGE. *Affirmed.*

W. G. Guthrie and *J. C. Cook*, for appellant.

Courtright, Sidner, Lee & Gunderson, contra.

Heard before GOSS, C. J., DEAN, GOOD, THOMPSON, EBERLY and DAY, JJ., and PAINE, District Judge.

PER CURIAM.

This action was commenced in the district court for Dodge county to recover a balance alleged to be due on a written contract. From a judgment in favor of defendant, plaintiff has appealed.

We have carefully examined the record and find it to be free from prejudicial error. The judgment of the district court is therefore

AFFIRMED.

O. L. KERR v. STATE OF NEBRASKA.

FILED FEBRUARY 14, 1930. No. 27268.

ERROR to the district court for Harlan county: J. W. JAMES, JUDGE. *Affirmed.*

J. G. Thompson and *B. B. Webber*, for plaintiff in error.

C. A. Sorensen, Attorney General, and *Clifford L. Rein, contra.*

Heard before GOSS, C. J., DEAN, GOOD, THOMPSON, EBERLY and DAY, JJ., and PAINE, District Judge.

PER CURIAM.

This is a proceeding in error brought to this court by O. L. Kerr, for a review of the judgment of the district court for Harlan county wherein he was convicted of the crime of incest.

We have carefully examined the record and find it to be free from prejudicial error. The judgment of the district court is therefore

AFFIRMED.

BENJAMIN KING, APPELLEE, V. WILLIAM T. FENTON, APPELLANT.

FILED FEBRUARY 28, 1930. No. 27257.

APPEAL from the district court for Lancaster county: ELWOOD B. CHAPPELL, JUDGE. *Affirmed.*

C. A. Sorensen, Attorney General, and *Clifford L. Rein,* for appellant.

Allen & Requartte, contra.

Heard before GOSS, C. J., ROSE, DEAN, GOOD, EBERLY and DAY, JJ., and MESSMORE, District Judge.

PER CURIAM.

This is an action in habeas corpus instituted by plaintiff against defendant as warden of the state penitentiary. Upon trial in the district court for Lancaster county, plaintiff was discharged from custody, and defendant has appealed.

We have carefully examined the record and find it to be free from prejudicial error. The judgment of the district court is therefore

AFFIRMED.

ROY PRIEST, APPELLEE, V. ELMER R. PORTER, APPELLANT.

FILED MARCH 19, 1930. No. 26840.

APPEAL from the district court for Douglas county: L. B. DAY, JUDGE. *Affirmed.*

Gaines, McGilton, Van Orsdell & Gaines and *Weaver & Giller,* for appellant.

Brome, Thomas, Ramsey & McGuire and *A. T. Bradford, contra.*

Heard before GOSS, C. J., DEAN, GOOD and EBERLY, JJ., and RHOADES, SPEAR and TEWELL, District Judges.

PER CURIAM.

This is an action to recover damages for malpractice. Upon trial in the district court for Douglas county a verdict

was rendered for plaintiff in the sum of $15,000. From a judgment rendered thereon defendant has appealed.

We have carefully examined the record and find the same to be free from prejudicial error. The judgment of the district court is therefore

AFFIRMED.

FRANK S. SELBY, APPELLEE, V. MARY N. SELBY, APPELLANT.

FILED MARCH 19, 1930. No. 27086.

APPEAL from the district court for Douglas county: HERBERT RHOADES, JUDGE. *Affirmed.*

Brogan, Ellick & Raymond, for appellant.

Congdon, Finlayson & Burke, contra.

Heard before GOSS, C. J., DEAN, THOMPSON, EBERLY and DAY, JJ., and CARTER and CHASE, District Judges.

PER CURIAM.

This is an action for divorce brought by plaintiff on the ground of the extreme cruelty of defendant. The decree of the district court for Douglas county awarded plaintiff an absolute divorce and gave defendant the household goods as permanent alimony with an option on her part to be paid the value of the goods if she so desired. Defendant has appealed.

We have carefully examined the record and find it to be free from prejudicial error. The judgment of the district court is therefore

AFFIRMED.

HARBINE BANK OF FAIRBURY, APPELLEE, V. PHOEBE KLASE, APPELLANT.

FILED MARCH 21, 1930. No. 27103.

APPEAL from the district court for Jefferson county: FREDERICK W. MESSMORE, JUDGE. *Affirmed.*

J. W. Moss and *Melvin Moss,* for appellant.

Heasty, Barnes & Rain, contra.

Heard before GOSS, C. J., DEAN, GOOD, EBERLY and DAY, JJ., and CARTER and CHASE, District Judges.

PER CURIAM.

This is an appeal from a judgment of the district court for Jefferson county confirming the sale of land sold to satisfy a deficiency judgment rendered on the foreclosure of a real estate mortgage.

We have carefully examined the record and find the same to be free from prejudicial error. The judgment of the district court is therefore

AFFIRMED.

FRANK L. SVOBODA, APPELLANT, V. HENRY MORTENSEN ET AL., APPELLEES.

FILED MARCH 21, 1930. No. 27127.

APPEAL from the district court for Seward county: HARRY D. LANDIS, JUDGE. *Affirmed.*

McKillip & Barth, for appellant.

Norval Brothers and *Thomas & Vail, contra.*

Heard before GOSS, C. J., DEAN, THOMPSON, EBERLY and DAY, JJ., and CARTER and CHASE, District Judges.

PER CURIAM.

Plaintiff brought this action in the county court of Seward county to recover the sum of $400 alleged to be due on a check drawn by defendant Mortensen on the Cordova State Bank. Upon trial a judgment was rendered in favor of defendants and plaintiff appealed to the district court. The district court for Seward county sustained a special appearance of defendants and dismissed plaintiff's appeal from the county court. Plaintiff has appealed.

We have carefully examined the record and find the same to be free from prejudicial error. The judgment of the district court is therefore

AFFIRMED.

CHARLES WIDGREN, APPELLANT, V. MARY OSTMAN ET AL.: AUGUSTA ROSELL ET AL., INTERVENERS, APPELLEES.

FILED MARCH 28, 1930. No. 27097.

APPEAL from the district court for Kearney county: J. W. JAMES, JUDGE. *Affirmed.*

C. P. Anderbery and *Lewis C. Paulson*, for appellant.

A. C. R. Swenson, Harry O. Palmer and *Arthur L. Palmer, contra.*

Heard before GOSS, C. J., DEAN, THOMPSON, EBERLY and DAY, JJ., and CARTER and CHASE, District Judges.

PER CURIAM.

This is an action involving a dispute as to the ownership of the sum of $5,000 which was deposited in the State Bank of Minden, Nebraska, by Peter G. Soderberg, deceased. The deposit in question is represented by a certificate of deposit held in trust by defendant Mary Ostman. Plaintiff has appealed from a judgment of the district court for Kearney county, by which the trial court found that the fund in question was held in trust for the benefit of the heirs of Peter G. Soderberg who resided in Sweden.

We have carefully examined the record and find the same to be free from prejudicial error. The judgment of the district court is therefore

AFFIRMED.

THOMPSON, J., took no part in the decision.

WILLYS-OVERLAND, APPELLEE, V. H. C. WILSON, APPELLANT.

FILED APRIL 3, 1930. No. 27102.

APPEAL from the district court for Douglas county: CHARLES LESLIE, JUDGE. *Affirmed.*

W. A. Ehlers, for appellant.

Frost, Nimtz & Hogle, contra.

Heard before GOSS, C. J., DEAN, THOMPSON, EBERLY and DAY, JJ., and CARTER and CHASE, District Judges.

PER CURIAM.

This is an action to replevin a Ford car and has heretofore been before this court under the same title but bearing general number 25677. Upon the former appeal the judgment of the district court was reversed by a judgment of this court entered on an opinion by the supreme court commission.

Upon a retrial a judgment was rendered giving defendant right to possession of the car and an equitable lien for the amount paid by him on the purchase price of the car. Defendant has appealed and contends that the district court for Douglas county erred in "having refused to submit the question of the damages to the defendant for the wrongful taking of the car in replevin."

We have carefully examined the record and find it to be free from prejudicial error. The judgment of the district court is therefore

AFFIRMED.

MARY L. DABERCO, APPELLEE, V. ARTHUR DABERKOW ET AL., APPELLANTS.

FILED APRIL 11, 1930. No. 27072.

APPEAL from the district court for Merrick county: FREDERICK L. SPEAR, JUDGE. *Affirmed.*

Walter R. Raecke, B. J. Cunningham and *H. G. Wellensiek,* for appellants.

Horth, Cleary & Suhr and *Edward J. Patterson, contra.*

Heard before GOSS, C. J., DEAN, THOMPSON, EBERLY and DAY, JJ., and CARTER and CHASE, District Judges.

PER CURIAM.

This is an appeal by defendants from a judgment of the district court for Merrick county in which plaintiff recovered damages for malicious prosecution.

We have carefully examined the record and find the same free from prejudicial error. The judgment of the district court is therefore

AFFIRMED.

HARRY C. WILSON COMPANY ET AL., APPELLEES, V. IRVIN MCMURRAY ET AL., APPELLANTS.

FILED APRIL 11, 1930. No. 27129.

APPEAL from the district court for Douglas county: FRANCIS M. DINEEN, JUDGE. *Affirmed.*

Pratt, Pratt & Anderson, for appellants.

R. H. Olmstead, contra.

Heard before GOSS, C. J., DEAN, THOMPSON, EBERLY and DAY, JJ., and FITZGERALD and HASTINGS, District Judges.

PER CURIAM.

This is an injunction suit in which plaintiffs ask that defendants be enjoined from disposing of certain promissory notes and that such notes be canceled and delivered to plaintiffs. The district court for Douglas county found in favor of plaintiffs and defendants have appealed.

We have carefully examined the record and find the same to be free from prejudicial error. The judgment of the district court is therefore

AFFIRMED.

GERMAN CRAIG V. STATE OF NEBRASKA.

FILED APRIL 11, 1930. No. 27131.

ERROR to the district court for Douglas county: JAMES M. FITZGERALD, JUDGE. *Affirmed.*

John M. Berger, A. S. Ritchie and *John E. von Dorn,* for plaintiff in error.

C. A. Sorensen, Attorney General, and *Homer L. Kyle, contra.*

Heard before GOSS, C. J., DEAN, THOMPSON, EBERLY and DAY, JJ., and HASTINGS, District Judge.

PER CURIAM.

This is a proceeding in error brought to this court by German Craig for a review of the judgment of the district court for Douglas county, wherein he was convicted of the

crime of larceny from the person under section 9598, Comp. St. 1922.

We have carefully examined the record and find it to be free from prejudicial error. The judgment of the district court is therefore

AFFIRMED.

ROY F. EVANS, APPELLANT, V. CITY OF OMAHA, APPELLEE.

FILED APRIL 11, 1930. No. 27139.

APPEAL from the district court for Douglas county: ARTHUR C. THOMSEN, JUDGE. *Affirmed.*

Weaver & Giller, for appellant.

John F. Moriarty, Thomas J. O'Brien and *B. J. Boyle, contra.*

Heard before GOSS, C. J., DEAN, GOOD, EBERLY and DAY, JJ., and FITZGERALD and HASTINGS, District Judges.

PER CURIAM.

This action was commenced in the district court for Douglas county by Roy F. Evans, a fireman, employed by defendant, the city of Omaha, to recover a portion of his annual salary. On his first cause of action plaintiff sought to recover an amount equal to his pay for one day in each month which had been deducted by the city. The second cause of action is for the recovery of pay for four days during the month of September, 1928, which had been deducted from the regular pay of plaintiff, by an order reducing the personnel of the fire department for four days a month. The trial court found in favor of plaintiff on his first cause of action and for the defendant on the second cause of action. Plaintiff has appealed and defendant has perfected a cross-appeal.

We have carefully examined the record and find the same to be free from prejudicial error. The judgment of the district court is therefore

AFFIRMED.

JOHN E. JOHNSON, APPELLEE, V. JONAS O. JOHNSON, ADMINISTRATOR, ET AL., APPELLANTS.

FILED APRIL 11, 1930. No. 27141.

APPEAL from the district court for Dawes county: EARL L. MEYER, JUDGE. *Affirmed.*

G. T. H. Babcock, Allen G. Fisher and *Charles A. Fisher,* for appellants.

E. D. Crites, F. A. Crites and *Nichols & Johnson, contra.*

Heard before GOSS, C. J., DEAN, GOOD, EBERLY, and DAY, JJ., and FITZGERALD and HASTINGS, District Judges.

PER CURIAM.

This is an action to foreclose a real estate mortgage. From a judgment of the district court for Dawes county in favor of plaintiff, defendant has appealed.

We have carefully examined the record and find it to be free from prejudicial error. The judgment of the district court is therefore

AFFIRMED.

CARL THORNTON, APPELLANT, V. LEO BENNINGHOVEN ET AL., APPELLEES.

FILED APRIL 18, 1930. No. 27002.

APPEAL from the district court for Douglas county: JAMES M. FITZGERALD, JUDGE. *Affirmed.*

Seymour L. Smith, for appellant.

William McDonnell, contra.

Heard before GOSS, C. J., ROSE, GOOD, THOMPSON, EBERLY and DAY, JJ., and LANDIS, District Judge.

PER CURIAM.

This is an action to recover damages upon two causes of action, one for false imprisonment and one for malicious prosecution. At the close of plaintiff's evidence, the district court sustained motions to dismiss made by defendants, and plaintiff has appealed.

We have carefully examined the record and find the same to be free from prejudicial error. The judgment of the district court is therefore

AFFIRMED.

CORA ADA BRABSON, APPELLEE, V. GUST PETERSON, APPELLANT.

FILED APRIL 18, 1930. No. 27006.

APPEAL from the district court for Kearney county: LEWIS H. BLACKLEDGE, JUDGE. *Affirmed.*

King & Bracken and *Lewis C. Paulson,* for appellant.

C. P. Anderbery, W. L. Minor and *Prince & Prince, contra.*

Heard before GOSS, C. J., ROSE, DEAN, GOOD, EBERLY and DAY, JJ., and DINEEN, District Judge.

PER CURIAM.

This is an action to recover damages for personal injuries and for damages to plaintiff's automobile sustained in a collision with the automobile of defendant. Upon trial in the district court for Kearney county the jury returned a verdict in favor of plaintiff for $1,500, and from a judgment entered thereon, defendant has appealed.

We have carefully considered the record and find the same to be free from prejudicial error. The judgment of the district court is therefore

AFFIRMED.

FARMERS & MERCHANTS BANK OF OMAHA, APPELLANT, V. OTTO J. BAUMAN, TREASURER, ET AL., APPELLEES.

FILED APRIL 18, 1930. No. 27049.

APPEAL from the district court for Douglas county: FRANCIS M. DINEEN, JUDGE. *Affirmed.*

Walter H. Justin, for appellant.

Henry J. Beal and *W. W. Slabaugh, contra.*

Heard before GOSS, C. J., ROSE, DEAN, GOOD, THOMPSON, EBERLY and DAY, JJ.

PER CURIAM.

This is an action by the Farmers & Merchants Bank of Omaha for a refund of real estate taxes paid in 1926, 1927, and 1928. The district court for Douglas county sustained a general demurrer filed by defendant, and plaintiff has appealed.

We have carefully examined the record and find the same to be free from prejudicial error. The judgment of the district court is therefore

AFFIRMED.

HENRY SCHNELL, APPELLEE, V. FARMERS BANK OF DUNBAR ET AL., APPELLANTS.

FILED MAY 1, 1930. No. 27068.

APPEAL from the district court for Otoe county: JAMES T. BEGLEY, JUDGE. *Affirmed.*

Thomas E. Dunbar, for appellants.

Paul Jessen, contra.

Heard before GOSS, C. J., DEAN, THOMPSON, EBERLY and DAY, JJ., and FITZGERALD and HASTINGS, District Judges.

PER CURIAM.

This is an action in injunction brought in the district court for Otoe county to enjoin the sale of land on execution. The trial court found in favor of plaintiff and defendants have appealed.

We have carefully examined the record and find that this case is controlled by the decision of this court in *Hiles v. Benton*, 111 Neb. 557. The judgment of the district court is therefore

AFFIRMED.

HENRY WENZEL, APPELLANT, V. D. G. GRIFFITH, APPELLEE.

FILED MAY 1, 1930. No. 27153.

APPEAL from the district court for Gage county: FREDERICK W. MESSMORE, JUDGE. *Affirmed.*

S. D. Killen, for appellant.

C. A. Sorenson, Attorney General, and *Homer L. Kyle, contra.*

Heard before GOSS, C. J., DEAN, THOMPSON, EBERLY and DAY, JJ., and FITZGERALD and HASTINGS, District Judges.

PER CURIAM.

Henry Wenzel brought this action in the district court for Gage county seeking his release from the state hospital for the insane located at Lincoln, Lancaster county, Nebraska, by writ of habeas corpus. Defendant Griffith, who is superintendent of the state hospital, filed a special appearance objecting to the jurisdiction of the court on the ground that plaintiff was confined in Lancaster county. The trial court sustained defendant's special appearance and plaintiff has appealed.

The sole issue presented is that of the jurisdiction of the district court for Gage county. We have carefully considered the record and find that this case is controlled by the holding of this court in *Gillard v. Clark,* 105 Neb. 84. The judgment of the district court is therefore

AFFIRMED.

SMITH BAKING COMPANY, APPELLEE, V. INTERIOR FLOUR MILLS COMPANY, APPELLANT.

FILED MAY 1, 1930. No. 27174.

APPEAL from the district court for Lancaster county: JEFFERSON H. BROADY, JUDGE. *Affirmed.*

Stewart, Stewart & Whitworth, for appellant.

William Niklaus, contra.

Heard before GOSS, C. J., ROSE, DEAN, THOMPSON, EBERLY and DAY, JJ., and LIGHTNER, District Judge.

PER CURIAM.

This is an action to recover damages for the partial breach of a written contract for the sale and delivery of flour. The cause was tried to a jury which returned a verdict in favor of plaintiff in the sum of $880.31, and from a judgment entered thereon by the district court for Lancaster county defendant has appealed.

We have carefully examined the record and find the same to be free from prejudicial error. The judgment of the district court is therefore

AFFIRMED.

GERTRUDE FAUST, APPELLANT, V. HARRY B. GORE ET AL., APPELLEES.

FILED MAY 1, 1930. No. 27182.

APPEAL from the district court for Lancaster county: JEFFERSON H. BROADY, JUDGE. *Affirmed.*

Sanden, Anderson, Laughlin & Gradwohl, for appellant.

Claude S. Wilson, Roy Gilkeson, Hymen Rosenberg, Frank A. Peterson and *Lloyd E. Chapman, contra.*

Heard before GOSS, C. J., ROSE, DEAN, GOOD, THOMPSON and DAY, JJ., and LIGHTNER, District Judge.

PER CURIAM.

This is an action to recover damages for personal injuries sustained by plaintiff as a result of being hit by a golf ball driven by defendant Gore. At the close of plaintiff's evidence the trial court sustained a motion of defendant city of Lincoln for a directed verdict. At the conclusion of all the testimony a motion for a directed verdict by the Antelope Golf Club was sustained. The jury returned a verdict in favor of plaintiff and against defendant Gore in the sum of one dollar, and plaintiff has appealed.

We have carefully examined the record and find the same to be free from prejudicial error. The judgment of the district court is therefore

AFFIRMED.

FARMERS UNION EXCHANGE OF HOLDREGE ET AL., APPELLANTS, V. F. A. YORK ET AL., APPELLEES.

FILED MAY 2, 1930. No. 27202.

APPEAL from the district court for Phelps county: LEWIS H. BLACKLEDGE, JUDGE. *Affirmed.*

Frank A. Anderson, for appellants.

O. E. Bozarth and *Dora Nelson, contra.*

Heard before GOSS, C. J., ROSE, DEAN, GOOD, THOMPSON and DAY, JJ., and LIGHTNER, District Judge.

PER CURIAM.

This is an action by plaintiff corporation and its directors to recover a 100 per cent. assessment on the paid-up stock of defendants in the corporation. The stock in question was nonassessable, but plaintiffs allege that such assessment was authorized by the board of directors and stockholders. The district court for Phelps county found in favor of defendants and plaintiffs have appealed.

We have carefully examined the record and find the same to be free from prejudicial error. The judgment of the district court is therefore

AFFIRMED.

JAMES A. HUNTER ET AL, APPELLEES, V. WILLIAM S. NICHOLSON, APPELLANT.

FILED MAY 2, 1930. No. 27217.

APPEAL from the district court for Sioux county: EARL L. MEYER, JUDGE. *Affirmed.*

Lee Basye, for appellant.

Mitchell & Gantz, contra.

Heard before GOSS, C. J., ROSE, DEAN, GOOD, THOMPSON and DAY, JJ., and LIGHTNER, District Judge.

PER CURIAM.

This is an appeal by defendant from an order of the district court for Sioux county overruling a motion of appellant to vacate and set aside a decree of foreclosure.

We have carefully examined the record and find the same to be free from prejudicial error. The judgment of the district court is therefore

AFFIRMED.

THOMAS S. KELLEY, APPELLANT, V. OTTO J. BAUMAN, TREASURER, ET AL., APPELLEES.

FILED MAY 2, 1930. No. 27223.

APPEAL from the district court for Douglas county: WILLIAM G. HASTINGS, JUDGE. *Affirmed.*

H. M. Kelley, for appellant.

Henry J. Beal, W. W. Slabaugh and *Holtz & Holtz, contra.*

Heard before GOSS, C. J., ROSE, DEAN, GOOD, THOMPSON and DAY, JJ., and LIGHTNER, District Judge.

PER CURIAM.

This is an action commenced in the district court for Douglas county to cancel a real estate tax on property owned by plaintiff and to enjoin collection thereof. The trial court found in favor of defendants and plaintiff has appealed.

We have carefully examined the record and find the same to be free from prejudicial error. The judgment of the district court is therefore

AFFIRMED.

JEWISH COMMUNITY CENTER OF OMAHA, APPELLEE, V. DOUGLAS COUNTY, APPELLEE: M. O. OLSON, APPELLANT.

FILED MAY 16, 1930. No. 27188.

APPEAL from the district court for Douglas county: WILLIAM G. HASTINGS, JUDGE. *Affirmed.*

William J. Hotz and *Robert H. Hotz,* for appellant.

Monsky, Katleman & Grodinsky, W. W. Slabaugh, Henry J. Beal, John F. Moriarty, Thomas J. O'Brien and *B. J. Boyle, contra.*

Heard before GOSS, C. J., ROSE, DEAN, GOOD, THOMPSON and DAY, JJ., and LIGHTNER, District Judge.

PER CURIAM.

This action was commenced by plaintiff in the district court for Douglas county to enjoin defendant Olson from obtaining a tax deed to real estate and to cancel the tax on the ground that the property in question was used for charitable, educational, and religious purposes during the years 1924, 1925, and 1926. The trial court found that at the time the 1924 county taxes and the 1925 city taxes were assessed the property was not exempt and gave Olson judgment for $1,870.08 with 12 per cent. interest from November 2, 1925. The trial court further found that the property was exempt during the time the other taxes in question were levied and entered judgment in favor of Olson and against the city of Omaha and the county of Douglas for the amount of the taxes thus paid, but denied him interest thereon. Olson has appealed.

We have carefully examined the record and find it to be free from prejudicial error. The judgment of the district court is therefore

AFFIRMED.

CATHERINE MCELHANY, APPELLANT, V. PEARL A. WELSHANS, APPELLEE.

FILED MAY 16, 1930. No. 27234.

APPEAL from the district court for Douglas county: CHARLES LESLIE, JUDGE. *Affirmed.*

Kennedy, Holland, DeLacy & McLaughlin, for appellant.

Montgomery, Hall, Young & Johnsen, contra.

Heard before GOSS, C. J., ROSE, GOOD, EBERLY and DAY, JJ., and JAMES and WRIGHT, District Judges.

PER CURIAM.

This is an action to recover damages for personal injuries. The district court for Douglas county sustained the demurrer filed by defendant, and plaintiff has appealed.

We have carefully examined the record and find it to be free from prejudicial error. The judgment of the district court is therefore

AFFIRMED.

CORRINE MCCARTY, APPELLANT, V. RUDGE & GUENZEL COMPANY, APPELLEE.

FILED MAY 16, 1930. No. 27241.

APPEAL from the district court for Lancaster county: ELWOOD B. CHAPPELL, JUDGE. *Affirmed.*

Sterling F. Mutz, for appellant.

Hall, Cline & Williams, contra.

Heard before GOSS, C. J., ROSE, DEAN, GOOD and DAY, JJ., and JAMES and WRIGHT, District Judges.

PER CURIAM.

This is an action to recover damages for personal injuries alleged to have been sustained by plaintiff while a passenger in an elevator in defendant's store. At the close of plaintiff's evidence the district court for Lancaster county sustained a motion for a directed verdict made by defendant Rudge & Guenzel Company. Plaintiff thereupon dismissed her case against another defendant and has appealed.

We have carefully examined the record and find it to be free from prejudicial error. The judgment of the district court is therefore

AFFIRMED.

FIRST NATIONAL BANK OF LEIGH, APPELLEE, V. HENRY KNUDSON ET AL.: NEWMAN GROVE STATE BANK, APPELLANT.

FILED MAY 16, 1930. No. 27242.

APPEAL from the district court for Platte county: LOUIS LIGHTNER, JUDGE. *Affirmed.*

C. M. Skiles & Vail & Flory, for appellant.

Wagner & Wagner and *W. M. Cain, contra.*

Heard before GOSS, C. J., ROSE, DEAN, GOOD and DAY, JJ., and JAMES and WRIGHT, District Judges.

PER CURIAM.

This is an action to recover the sum of $7,000 loaned by plaintiff to defendant Knudson and deposited by him in the Newman Grove State Bank to his personal account. The Newman Grove State Bank later applied the sum of $6,874.34 from this deposit to the payment of a past-due note of Knudson. This transaction was approved by Knudson. Plaintiff alleged that the original loan of $7,000 was obtained by fraud and sought to impress a trust upon the amount applied in payment of the Knudson note by the Newman Grove State Bank. The district court for Platte county found in favor of plaintiff, and defendant Newman Grove State Bank has appealed.

We have carefully examined the record and find it to be free from prejudicial error. The judgment of the district court is therefore

AFFIRMED.

MICHAEL TIGHE, APPELLEE, V. BEN LAW ET AL.: WILLIAM E. HOWIE ET AL., APPELLANTS.

FILED MAY 16, 1930. No. 27255.

APPEAL from the district court for Douglas county: ALEXANDER C. TROUP, JUDGE. *Affirmed.*

Lawrence I. Shaw, for appellants.

Ziegler & Dunn, John W. Yeager and *Bryce Crawford, Jr., contra.*

Heard before GOSS, C. J., ROSE, DEAN, GOOD, EBERLY and DAY, JJ., and WRIGHT, District Judge.

PER CURIAM.

This is an action to recover damages for personal injuries sustained as a result of a collision between a truck in which plaintiff was riding and a truck owned by defendant Howie. The jury found in favor of plaintiff, and from

a judgment entered by the district court for Douglas county defendants have appealed.

We have carefully examined the record and find it to be free from prejudicial error. The judgment of the district court is therefore

AFFIRMED.

GILINSKY FRUIT COMPANY, APPELLANT, V. AMERICAN RAILWAY EXPRESS COMPANY, APPELLEE.

FILED MAY 23, 1930. No. 27156.

APPEAL from the district court for Douglas county: CHARLES LESLIE, JUDGE. *Affirmed.*

Gaines, McGilton, Van Orsdel & Gaines, for appellant.

Brown, Fitch & West, contra.

Heard before GOSS, C. J., ROSE, DEAN, GOOD, THOMPSON and EBERLY, JJ., and THOMSEN, District Judge.

PER CURIAM.

This is an action to recover for damages alleged to have been sustained by plaintiff by reason of the careless and negligent handling by defendant of a quantity of strawberries shipped to plaintiff from Ponchatoula, Louisiana. At the conclusion of the testimony the district court for Douglas county sustained defendant's motion for a directed verdict and plaintiff has appealed.

We have carefully examined the record and find it to be free from prejudicial error. The judgment of the district court is therefore

AFFIRMED.

STATE, EX REL. DAWES COUNTY AGRICULTURAL AND FAIR ASSOCIATION, APPELLEE, V. J. E. STRAIT ET AL., APPELLEES: H. J. STROHMEYER ET AL., APPELLANTS.

FILED MAY 23, 1930. No. 27260.

APPEAL from the district court for Dawes county: EARL L. MEYER, JUDGE. *Affirmed.*

J. E. Porter, for appellants.

F. A. Crites, Allen G. Fisher and *Charles A. Fisher, contra.*

Heard before GOSS, C. J., ROSE, DEAN, GOOD, THOMPSON and EBERLY, JJ., and THOMSEN, District Judge.

PER CURIAM.

This is an action in mandamus to compel payment to the relator of the sum of $2,000 alleged to have been levied in the year 1928 for the support of relator. The district court for Dawes county found in favor of relator and interveners have appealed.

We have carefully examined the record and find it to be free from prejudicial error. The judgment of the district court is therefore

AFFIRMED.

ELLA M. HOSTETLER, APPELLEE, V. FLOYD E. WRIGHT ET AL., APPELLANTS.

FILED MAY 23, 1930. No. 27294.

APPEAL from the district court for Buffalo county: ISAAC J. NISLEY, JUDGE. *Affirmed.*

Craft, Edgerton & Fraizer, for appellants.

Miller & Blackledge, contra.

Heard before GOSS, C. J., ROSE, DEAN, GOOD, THOMPSON and DAY, JJ., and THOMSEN, District Judge.

PER CURIAM.

This is an action in injunction brought to restrain defendants from interfering with a certain retail merchandise business in the village of Shelton, operated by plaintiff and which defendants Floyd E. Wright and E. J. Wright allege they had contracted to purchase. The district court for Buffalo county found in favor of plaintiff and defendants have appealed.

We have carefully examined the record and find it to be

free from prejudicial error. The judgment of the district court is therefore

AFFIRMED.

LORRAINE L. MCCORD, APPELLANT, V. JAMES G. MCCORD, APPELLEE.

FILED MAY 29, 1930. No. 27100.

APPEAL from the district court for Douglas county: HERBERT RHOADES, JUDGE. *Affirmed as modified.*

Brogan, Ellick & Raymond and *George S. Wright*, for appellant.

Gaines, McGilton, Van Orsdel & Gaines, contra.

Heard before GOSS, C. J., ROSE, DEAN, GOOD and EBERLY, JJ., and JAMES and WRIGHT, District Judges.

PER CURIAM.

Plaintiff brought this action in the district court for Douglas county seeking a divorce from defendant on the grounds of extreme cruelty. The trial court granted a decree of divorce and gave plaintiff as alimony certain jewelry and household goods, $2,900 in cash and the sum of $200 a month during the life of defendant or until plaintiff should remarry. Plaintiff was also allowed an attorney fee of $2,500. On appeal plaintiff complains only of the allowance of alimony.

We have carefully examined the entire record and conclude that the judgment of the district court should be modified by increasing the amount of alimony from $200 a month to $375 a month, and that an additional sum of $1,000 should be allowed as attorney fees, making a total allowance of $3,500 for services of plaintiff's attorneys in both district and supreme courts. In all other respects the judgment of the district court is affirmed.

AFFIRMED AS MODIFIED.

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2. Chapter 65, Laws 1925, an act to determine heirship, *held* to repeal conflicting provisions of sections 1423 and 1424, Comp. St. 1922. *In re Heirship of Robinson* 285
3. The heirship statute provides for a limited administration of an estate after two years from intestate's death without administration. *In re Heirship of Robinson* 285
4. The proviso in section 1484, Comp. St. 1922, relating to liens against intestate's realty, *held* not to include liens created on decedent's death in favor of creditors. *In re Heirship of Robinson* 285

Divorce.

1. A contract for a property settlement and alimony approved by the court will not be set aside or modified, except for fraud or change in circumstances. *Williams v. Williams* 8
2. Refusal to modify a divorce decree as to alimony upheld, except as to insurance premiums. *Williams v. Williams* 8

3. The father *held* entitled to custody of child, awarded to divorced mother, on death of mother. *In re Guardianship of Peterson* 511
4. A court has inherent power to enforce compliance with award of alimony, suit money, and attorney's fees, by imprisonment for contempt, if necessary. *Jensen v. Jensen* 469
5. Contempt proceeding for failure to pay award of attorney's fees in divorce suit is predicated on the award and decree and refusal to comply therewith. *Jensen v. Jensen* 469
6. A decree of divorce granted a wife on the ground of extreme cruelty *held* not to estop the husband from suing the wife's relatives for alienation of the wife's affections. *Dunbier v. Mengedoht* 706

Elections.

1. Statute requiring the voter to "make a cross in the square to the left of every candidate for whom he desires to vote" *held* directory, and substantial compliance therewith sufficient. *State, ex rel. Lanham, v. Sheets* 145
2. Statute requiring the voter to make a cross in the square opposite the name on the ballot *held* directory. *State, ex rel. Lanham, v. Sheets* 145
3. Writing name in proper place on a ballot sufficiently indicates intent to vote for such person, though no cross is made opposite the name. *State, ex rel. Lanham, v. Sheets* 145

Eminent Domain.

1. Seepage from irrigation ditches *held* not to entitle adjoining landowners to damages for taking or damaging private property for public use. *Spurrier v. Mitchell Irrigation District* 401
2. The constitutional provision relating to the taking or damaging of private property for public use applies to special damages to land by vacation of a public highway. *Lowell v. Buffalo County* 776
3. The words "or damaged," as used in the constitutional provision relating to damaging of private property for public use, include all damages causing diminution in value of the property. *Lowell v. Buffalo County* 776
4. The law provides for the ascertainment and payment of special damages to private property by vacation of a public highway. *Lowell v. Buffalo County* 776
5. An appeal lies to the district court from an award of special damages to private property by vacation of a public highway. *Lowell v. Buffalo County* 776

6. The jury in determining damages from vacating a highway may consider resulting diversion of travel and removal of a mail box and a schoolhouse. *Lowell v. Buffalo County* 776
7. Special damages to private property by vacating a public highway include any loss or injury that reduces its value. *Lowell v. Buffalo County* 776
8. Ordinarily, a landowner cannot recover, on account of a lawful public improvement, damages suffered in common with the public generally. *Lowell v. Buffalo County* 776
9. A landowner suffering special damages because of vacating a public highway is entitled to recover the difference between the value of his property immediately before and after the change. *Lowell v. Buffalo County* 776
10. A landowner left with only one outlet because of vacation of a public highway may suffer special damages not common to the community at large. *Lowell v. Buffalo County* 776
11. Any factor reducing the market value of real estate may be considered in determining just compensation for special damages. *Lowell v. Buffalo County* 776

Equity.

Laches does not grow out of mere passage of time, but it is founded on the inequity of permitting enforcement of a claim. *Geiss v. Trinity Lutheran Church Congregation* 745

Estoppel.

Where a purchaser permits his agent to take title, he is estopped from setting up ownership against one loaning money on the strength of the agent's title. *Kamrath v. Gilbert* 51

Evidence. SEE RAPE. WITNESSES.

1. Testimony tending to prove that an automobile driver was under the influence of liquor may be given by a non-expert witness. *McCulley v. Anderson* 105
2. Public reputation, and declarations of early settlers, and even of deceased persons, may be competent to establish a monument as marking a section corner, but insufficient to establish it as a particular corner. *Hickman v. Jones* 485
3. Stockman *held* competent to testify to market value of live stock. *Allender v. Chicago & N. W. R. Co* 559
4. Cattle buyer *held* competent to testify to average weight of cattle. *Allender v. Chicago & N. W. R. Co* 559
5. Parol evidence is admissible to prove that a note was

given without consideration as accommodation paper and for a special purpose. *Lee v. Hildebrand* 717

6. Financial statements of a corporation *held* admissible to show the market value of its stock. *Heller v. Speier* 787
7. Testimony of witnesses familiar with the value of stocks generally and knowing a corporation's reputation, assets, and liabilities, *held* competent as to the market value of its stock. *Heller v. Speier* 787
8. Opinion of nonexpert witnesses as to writing has less weight on the issue of forgery than opinion of experts. *Bank of Commerce v. McCarty* 795
9. The opinion of handwriting experts is competent on the issue of forgery in a civil action. *Bank of Commerce v. McCarty* 795
10. Testimony of handwriting experts that a note is a forgery may be sufficient to overturn the testimony of witnesses that they saw the note executed. *Bank of Commerce v. McCarty* 795

Executors and Administrators.

1. A grant of administration has, as a matter of right, no extraterritorial force. *In re Heirship of Robinson* 285
2. Finding as to personal property of decedent *held* erroneous. *In re Estate of Wecker* 537
3. It is the duty of an executor to acquaint himself with the title to decedent's property and to enforce an accounting thereof as against persons in adverse possession. *In re Estate of Freling* 605
4. All chattels of deceased are assets, if the representative by reasonable diligence might have taken possession thereof. *In re Estate of Freling* 605
5. Where an executor's interest in the administration and in the disposition of the estate is such as to prevent impartial performance of his duties, he should be removed. *In re Estate of Marconnit* 73
6. An executor whose personal interests conflict with, or are antagonistic to, his duties as executor is not a proper person to act as such. *In re Estate of Marconnit* 73
7. An administrator is a quasi trustee and should stand at least indifferent between the estate and claimants. *In re Estate of Marconnit* 73

Exemptions.

Whether property in the hands of a garnishee is exempt is to be determined as of the date of service of garnishee summons. *Wilcox & Co. v. Deines* 692

Forgery.

Evidence *held* to sustain verdict of guilty. *Murray v. State* 16

Fraud.

In an action for damages for fraud in exchange of realty, the question as to time when plaintiff discovered the fraud, or facts constituting the fraud or sufficient to require inquiry, is for the jury. *Vrbsky v. Arendt* 443

Gifts.

1. Reservation of interest to the donor during his lifetime does not invalidate a gift. *In re Estate of Sides* 314
2. Where a father gave money to his children, taking notes therefor reciting they should be canceled on his death, and the notes were delivered to a trustee, *held* that it was a gift *inter vivos*, and not testamentary. *In re Estate of Sides* 314
3. Evidence *held* insufficient to establish gift of certain notes. *In re Estate of Sides* 314

Guardian and Ward.

1. Residence of minor, under guardianship law, is that of the parent legally entitled to its custody. *In re Guardianship of Peterson* 511
2. Where a divorced mother, awarded restricted custody of a child, removes from the county where decree was rendered and the father resides, the county court of the county of the mother's domicile does not, on the death of the mother, acquire jurisdiction to appoint a guardian of the child over objections and rights of the father. *In re Guardianship of Peterson* 511
3. A guardian is without authority to surrender custody of his ward to any person, unless licensed by the state department of public welfare. *Foster v. Hartman* 578
4. A guardian's contract to surrender control of his ward during minority is contrary to public policy. *Foster v. Hartman* 578

Hawkers and Peddlers.

The term "itinerant vendor" in licensing ordinance *held* not to include a wholesale baker selling and distributing bread to retail customers. *Petersen Baking Co. v. City of Fremont* 212

Highways. SEE NEGLIGENCE.

1. Right of way privileges on arterial highways are the same as on nonfavored streets, except as modified by the stop requirement. *McCulley v. Anderson* 105

2. The right of a motorist on an arterial highway to assume that a vehicle entering the highway will stop does not warrant excessive speed or disregard of other traffic regulations. *McCulley v. Anderson* 105
3. An ordinance designating a street as an arterial highway does not grant an exclusive privilege to drivers thereon. *McCulley v. Anderson* 105
4. A motorist entering an arterial highway has a right to assume that motorists on the arterial highway will obey traffic regulations, and, if necessary, slacken their speed. *McCulley v. Anderson* 105
5. Compensation on appeal from an award of damages caused by vacating a public highway must be ascertained in the same manner as in actions by ordinary proceedings. *Lowell v. Buffalo County* 776
6. An unexpended balance in the road dragging fund cannot be set aside for use of separate supervisor districts. *State, ex rel. Maltman, v. Adams County* 826

Homicide.

1. The admission of a dying declaration is a question to be determined by the nature of each case. *Penn v. State* 95
2. Dying declarations need not be made in any prescribed form or manner. *Penn v. State* 95
3. The weight and credibility of dying declarations are for the jury. *Penn v. State* 95
4. The admissibility of a statement by the victim that he was shot by accused is a question for the court. *Penn v. State* 95
5. A statement by the victim that he was shot by accused is admissible in evidence, if made under a sense of impending death; and the foundation for its admission may be shown by circumstances. *Penn v. State* 95
6. The time elapsing between the making of a dying declaration and dissolution is not necessarily a factor in determining its admissibility. *Penn v. State* 95
7. Failure to give a requested instruction on "motive" *held* error. *Trobough v. State* 128
8. Evidence *held* to sustain conviction of manslaughter. *Pembrook v. State* 417

Husband and Wife.

1. The wife's homestead right in lands owned by the husband and occupied by the family is "real estate." *Mead v. Polly* 206
2. Antenuptial contracts are not against public policy. *In re Estate of Maag* 237

3. Antenuptial contracts should be construed in the light of the particular circumstances of each case, and be enforced or annulled according to the facts. *In re Estate of Maag* 237
4. In making an antenuptial contract, the prospective husband must make full disclosure as to the amount and value of his property. *In re Estate of Maag* 237
5. The burden is on the husband or his representative to show that an antenuptial contract apparently unjust to the wife was fairly procured. *In re Estate of Maag* .. 237
6. Antenuptial contract giving $5,000 to the wife on death of husband *held* invalid. *In re Estate of Maag* 237
7. As respects personal property, the husband during his lifetime is unrestricted as to incidents of ownership, except as limited by section 2550, Comp. St. 1922. *In re Estate of Sides* 314
8. Evidence *held* insufficient to sustain finding that deceased husband's gifts to children by former marriage were a fraud on his surviving widow. *In re Estate of Sides* 314
9. A husband may sue for alienation of his wife's affections notwithstanding his own misconduct, where defendant's conduct was the controlling cause of the wife's estrangement. *Dunbier v. Mengedoht* 706
10. A husband's participation in an illegal abortion performed on his wife, where not necessary to prove his case, *held* not to prevent recovery for alienation of his wife's affections. *Dunbier v. Mengedoht* 706
11. In an action by the husband for alienation of a wife's affections, where several persons are alleged to have formed a conspiracy to wrongfully alienate the wife's affections and cause separation and divorce, the damage done is the gist of the action. *Dunbier v. Mengedoht* 706
12. The life estate of a spouse in a homestead becomes extinct upon her death, as do the rights of her common creditors as to such homestead. *In re Estate of Freling* .. 605

Indians.

1. Federal statutes *held* to authorize, on consent of Secretary of Interior, an Omaha Indian allottee to transfer a complete title. *Wollmer v. Wood* 248
2. An Omaha Indian's conveyance of an allotment *held* to give title in fee, exempt from debts of allottee created before patent was issued, but not debts of a subsequent grantee. *Wollmer v. Wood* 248

Indictment and Information.

1. A party may be charged with murder while attempting to perpetrate a burglary in one count, and in another count with murder, where both are parts of the same transaction; and the state is not required to elect to proceed to trial on one of the counts. *Penn v. State*..... 95
2. An information charging assault with intent to kill or wound by shooting *held* to authorize conviction of assault and battery. *In re Application of Flanders*..... 761

Injunction.

1. Where a permanent injunction is denied, plaintiff is not entitled to a supersedeas as a matter of right, unless a temporary injunction is in effect at time of trial. *Harbin v. Love*..... 76
2. A temporary restraining order cannot be continued in effect by supersedeas bond after denial of a permanent injunction. *Harbin v. Love*..... 76
3. Whether an order is a temporary restraining order or a temporary injunction is determinable from the entire record. *Harbin v. Love*..... 76
4. Continuance of the hearing on a temporary injunction from the time provided in the restraining order is not sufficient to convert a restraining order into an injunction. *Harbin v. Love*..... 76
5. A restraining order cannot in effect become an injunction without the giving of a new bond. *Harbin v. Love*..... 76
6. Order in effect at the time of trial *held* not a temporary injunction. *Harbin v. Love*..... 76
7. A default and a resulting perpetual injunction may be set aside on motion supported by an answer stating a complete defense and a showing that the default was excusable. *Ak-Sar-Ben Exposition Co. v. Sorensen*..... 358
8. Evidence *held* to show an abuse of discretion in overruling a motion to set aside a default and a resulting perpetual injunction. *Ak-Sar-Ben Exposition Co. v. Sorensen*..... 358
9. Injunction is not available to enforce a legal right where there is a plain, adequate and speedy remedy at law. *Vance v. Sumner*..... 630
10. The remedy of forcible entry and detainer being adequate, a lessor is not entitled to an injunction restraining the lessee from interfering with lessor's entry on premises under lease. *Vance v. Sumner*..... 630

Insane Persons.

A guardian's proceeding to obtain a license to mortgage realty of an insane ward is a proceeding *in rem*, not requiring service of notice on the ward. *Mead v. Polly*..... 206

Insurance.

1. The statute providing for attorney's fees in an action on an insurance policy is based on public policy. *Messing v. Dwelling House Mutual Ins. Co*..... 36
2. Attorney's fees *held* chargeable against plaintiff in an unsuccessful suit to vacate a judgment on an insurance policy. *Messing v. Dwelling House Mutual Ins. Co*..... 36
3. Articles not clearly within an exemption clause *held* covered by the policy. *Coad v. London Assurance Corporation* 188
4. Insurer *held* not liable for fire loss of automobile while being operated by a lessee. *Borsky v. National Fire Ins. Co*..... 178
5. Where an automobile policy was suspended at the time of loss by fire, *held* error to refuse to direct a verdict for the insurer. *Borsky v. National Fire Ins. Co*..... 178
6. One who pleads an affirmative defense must prove it. *Ude v. Modern Woodmen of America*..... 546
7. Provision in policy that insurer should not be liable beyond actual cash value of property at time of loss *held* valid and determinative of rights and liabilities, and applicable to losses not within the scope of the valued policy act; that loss or damage was ascertainable according to actual cash value, with proper deduction for depreciation; that the provision, loss or damage should not exceed cost of repairs, was merely a limitation on the amount of recovery. *Voges v. Mechanics Ins. Co*..... 553
8. Policy limiting liability *held* to fix damages at actual cash value of building prior to fire as compared with its actual cash value after the fire. *Voges v. Mechanics Ins. Co.* 553

Intoxicating Liquors.

1. Bootlegging law *held* not in conflict with any other liquor law. *Liske v. State*..... 640
2. Amendment to bootlegging law does not bar conviction for a third offense, although the first and second offenses were committed prior to adoption thereof. *Liske v. State* 640

Judgment. SEE CONSPIRACY. PLEADING, 4.

1. Judgments should be set aside only on the strongest and most convincing grounds. *Messing v. Dwelling House Mutual Ins. Co.* ... 36
2. Allowance of claims by the probate court of another state does not affect lands in Nebraska. *In re Heirship of Robinson* ... 285
3. Any one of several defendants adjudged primarily liable for an aliquot part of a judgment and surety for the other defendants as to the remainder may pay the judgment and take an assignment thereof; and such payment does not extinguish the judgment except as to the judgment creditor. *Orchard & Wilhelm Co. v. Sexson* ... 370
4. Where an assignee is entitled to a revival of a judgment, it should be revived in its entirety. *Orchard & Wilhelm Co. v. Sexson* ... 370
5. A final judgment on the merits in a proceeding *in rem* is an absolute bar to subsequent proceedings founded on the same facts, and such judgment binds successors in title. *Keim v. Village of Bloomington* ... 474
6. A judgment does not bar an action between the same parties unless the same issue was involved in both actions. *Hickman v. Jones* ... 485
7. Judgment in replevin involving possession of hay *held* not a bar to a suit to quiet title. *Hickman v. Jones* ... 485

Judicial Sales.

1. Exemption of realty from levy and sale under the federal laws may not be considered on proceedings for confirmation of a judicial sale. *Wollmer v. Wood* ... 248
2. A motion to confirm a sheriff's sale cannot be resisted on the ground that the land is exempt from lien of the judgment, and such an attempt to resist will not bar a subsequent action to remove the cloud of the sheriff's deed. *Wollmer v. Wood* ... 248

Jury.

1. If a cause of challenge is denied by a juror on his *voir dire* after accused's peremptory challenges are exhausted, he has the right to have the issue tried by the court as other issues of fact are tried. *Trobough v. State* ... 128
2. Appeal from refusal of county court to make allowance out of estate of deceased husband for the widow is a law action. *In re Estate of Maag* ... 237
3. The court may determine whether a juror's condition from drink required discharge of the jury. *Fetty v. State* ... 619

4. The court, in determining whether a juror's drunkenness required discharge of the jury, may consider his appearance and condition. *Fetty v. State* 619
5. Drunkenness of juror is an "accident" or "calamity" requiring discharge of the jury. *Fetty v. State* 619
6. Peremptory challenges are not to be exercised until the jurors have been passed for cause. *Fetty v. State* 619
7. Defendant may examine jurors for cause until the jury is impaneled, and a denial of the right is prejudicial error. *Fetty v. State* 619

Larceny.

1. Felonious intent is an essential element of grand larceny. *West v. State* 633
2. Evidence *held* insufficient to sustain conviction for grand larceny. *West v. State* 633
3. No presumption of guilt arises from the mere possession of stolen property; it is merely a fact to be considered in connection with other evidence. *Ridenour v. State* 688

Licenses.

1. Statute providing for corporation fee for domestic corporations *held* unambiguous. *State, ex rel. Beatrice Creamery Co., v. Marsh* 197
2. Statutory tax on corporations *held* in the nature of a franchise tax, rather than one on property, capital stock, or business. *State, ex rel. Beatrice Creamery Co., v. Marsh* 197
3. An excise tax on the wholesale business of baking, selling and distributing bread to regular customers is void if so excessive as to prohibit business. *Petersen Baking Co. v. City of Fremont* 212
4. To be valid a license tax ordinance must be definite in its application, reasonable in amount, and uniform as to class. *Petersen Baking Co. v. City of Fremont* 212

Malicious Mischief.

Evidence *held* to sustain verdict of guilty. *Roeder v. State* 116

Mandamus.

1. When the law requires a public officer to do an official act at a particular time, courts will, when practicable, coerce performance after the appointed time has passed. *Omaha Armory Bldg. Co. v. Johnson* 29
2. Mandamus is the proper remedy to enforce a stockholder's right to inspect the books and records of a state bank. *State, ex rel. Charvat, v. Sagl* 374

3. A mandamus proceeding is an action at law. *State, ex rel. Charvat, v. Sagl* 374

Master and Servant.

1. When an injury "arises out of," and "in the course of," the employment, stated. *Speas v. Boone County* 58
2. An injury during the noon hour to one dragging roads for a county, *held* to have arisen out of and in the course of his employment. *Speas v. Boone County* 58
3. The statute of limitations is not available to an employer who has agreed within the year after an accident to compensate the employee. *Speas v. Boone County* 58
4. Technical refinements of interpretation will not be permitted to defeat the purpose of the workmen's compensation act. *Speas v. Boone County* 58
5. The rule that findings of the trial court on conflicting evidence in compensation cases will not be disturbed applies to judgments rendered before statute providing for trial *de novo* on appeal. *Travelers Ins. Co. v. Ohler* .. 121
6. Finding as to the cause of disability *held* contrary to weight of evidence. *Travelers Ins. Co. v. Ohler* 121
7. Notice of claim and action commenced within the statutory period after discovery that a latent injury has caused compensable disability is a compliance with the statute. *Travelers Ins. Co. v. Ohler* 121
8. Selection by an employer of one simple tool rather than some other is not negligence. *Phillips v. Chicago, B. & Q. R. Co* 182
9. The rule requiring an employer to exercise ordinary care to provide reasonably safe tools has little application to simple tools in common use. *Phillips v. Chicago, B. & Q. R. Co* 182
10. The employer must use reasonable care and ordinary prudence in selecting tools. *Phillips v. Chicago, B. & Q. R. Co* 182
11. Where there was no evidence of negligence in an action for injury to a section foreman, the court should have directed a verdict for defendant. *Phillips v. Chicago, B. & Q. R. Co* 182
12. To recover against an employer under the federal law, some specific neglect, or act of negligence, proximately causing injury or death, must be alleged and proved. *Diller v. Chicago, B. & Q. R. Co* 494
13. Evidence *held* insufficient to establish negligence of railroad proximately causing death of an employee. *Diller v. Chicago, B. & Q. R. Co* 494

14. An injury resulting in part from an accident is compensable though claimant may be afflicted with an occupational disease. *Skelly Oil Co. v. Gaugenbaugh* 698
15. If injury and preexisting disease combine to produce disability, an employee to recover compensation need not prove that the injury aggravated the disease. *Skelly Oil Co. v. Gaugenbaugh* 698
16. Employer *held* to have notice of injury, rendering service of written notice unnecessary. *Skelly Oil Co. v. Gaugenbaugh* 698
17. Summons on appeal from compensation award may be amended to correct mistake in date of return, even after objections to jurisdiction on that account. *Keil v. Farmers Irrigation District* 503
18. The statutory provision requiring service of copy of petition on appeal from compensation award is directory. *Keil v. Farmers Irrigation District* 503

Militia.

Held, that it was the duty of the adjutant general to lease an armory for the national guard. *Omaha Armory Bldg. Co. v. Johnson* 29

Mines and Minerals.

1. The state may convey saline lands, with the reservation that the salt springs shall belong to the state if they become commercially valuable. *State, ex rel. Central Realty & Investment Co., v. McMullen* 739
2. Congress, by reserving salt springs, intended to include those valuable for making salt. *State, ex rel. Central Realty & Investment Co., v. McMullen* 739

Mortgages.

Oral agreement to give a mortgage *held* void. *Herring v. Whitford* 733

Municipal Corporations.

1. "General fund," in statute relating to taxation of intangibles, referring to cities and villages, *held* to mean a fund set apart for governmental, not corporate, expenses. *Mehrens v. Greenleaf* 82
2. A municipal corporation, so far as its purely municipal relations are concerned, is an agency of the state subject to legislative control. *Mehrens v. Greenleaf* 82
3. Where the legislature grants a municipal power and prescribes exclusive methods of exercising it, the municipality must follow those methods. *Carr v. Fenstermacher* 172

4. A grant of power to a city may imply a means of exercising it in addition to statutory methods. *Carr v. Fenstermacher* 172
5. The cost of a municipal lighting utility in cities of the second class may be defrayed by a tax levy and, if insufficient, by a bond issue. *Carr v. Fenstermacher*..... 172
6. Where a city of the second class has available money to pay for a municipal lighting utility, resort to taxation or a bond issue may be unnecessary, such methods not being exclusive. *Carr v. Fenstermacher*..... 172
7. The word "may" in the statute authorizing a city of the second class to defray the cost of a municipal lighting plant by taxation or a bond issue does not necessarily mean "shall." *Carr v. Fenstermacher*..... 172
8. Contracts beyond the power of a municipality are such as it cannot lawfully enter into for any purpose. *Carr v. Fenstermacher*..... 172
9. Cities of the second class *held* authorized to install and maintain a municipal lighting plant out of funds on hand and plant earnings. *Carr v. Fenstermacher*..... 172
10. A city charter provision requiring an appropriation in advance of incurring an indebtedness may not apply to a conditional obligation payable out of funds on hand and net earnings of a municipal lighting plant. *Carr v. Fenstermacher*..... 172
11. A city engineer's estimate of equipment for a municipal lighting utility as costing "not to exceed" a particular sum, *held* a mere irregularity. *Carr v. Fenstermacher* 172
12. A notice requiring bids "on or before" a specific date instead of stating the hour for closing and opening bids, *held* not to invalidate a subsequent contract of purchase. *Carr v. Fenstermacher*..... 172
13. The duty of a city to fix reasonable rates for electricity *held* not violated by a contract to pay for plant equipment out of net earnings. *Carr v. Fenstermacher*..... 172
14. In absence of fraud or mistake, action of city council in passing on the validity of proceedings for consolidation of an adjoining village with a city is final. *State, ex rel. Loomis, v. City of Lincoln*..... 352
15. The trend of legislation and decision is toward relaxation of rules respecting procedure before political bodies only occasionally exercising judicial functions. *State, ex rel. Loomis, v. City of Lincoln*..... 352
16. The determination of a city council on a matter which it is authorized to determine has all the properties of

a judgment of a court of limited jurisdiction. *State, ex rel. Loomis, v. City of Lincoln* 352
17. Power delegated to a city to construct local improvements and levy special assessments therefor will be strictly construed against the city. *Baker v. Dahlman* 425
18. A statute authorizing a city to resurface a street without petition *held* not to authorize resurfacing of more than one street in the same proceeding. *Baker v. Dahlman* 425
19. A decree denying detachment of farm land from a municipality will not be set aside except for mistake of fact or erroneous inference of fact or of law, and this rule applies with peculiar force where the trial judge inspected the premises. *Keim v. Village of Bloomington* 474
20. Police officers of Omaha are required to give bond to the city as obligee for faithful performance of official duties. *Curnyn v. Kinney* 478
21. The statute providing that official bonds shall be obligatory on the principal and sureties for the use of any person injured is part of the official bond of a police officer. *Curnyn v. Kinney* 478
22. Recovery may be had on the bond of a policeman for negligent acts committed by him in the exercise of municipal authority resulting in personal injury, by the person injured. *Curnyn v. Kinney* 478
23. A policeman, operating a motorcycle in transporting himself from one place of duty to another, was acting officially, and was liable on his bond for negligence. *Curnyn v. Kinney* 478
24. Special assessments cannot exceed special benefits. *Neville v. City of Omaha* 550
25. A city may enjoin an individual from conducting a restaurant or commercial business in a district zoned for resident purposes, and the suit is not wanting in equity because the city does not proceed against a school maintaining a cafeteria. *City of Lincoln v. Foss* 666
26. Zoning ordinance *held* to be constitutional under the police power as having substantial relation to the public health, safety, and general welfare. *City of Lincoln v. Foss* 666
27. Zoning ordinance *held* not to confer on board of appeals delegated authority or arbitrary power to give or withhold consent for carrying on business in residence districts. *City of Lincoln v. Foss* 666
28. Cities of the metropolitan class are not liable for damages caused by surface water, because its storm

sewers are insufficient to carry all of such water. *Adams v. City of Omaha* 753

29. Cities of the metropolitan class have authority, but are not required, to construct storm sewers. *Adams v. City of Omaha* 753

30. A property owner cannot recover damages caused by surface water flooding his premises, unless he shows that the damage resulted from some negligent act or omission by the city. *Adams v. City of Omaha* 753

Negligence. SEE HIGHWAYS. RAILROADS.

1. A motorist exercising due care is not liable for negligence merely because he attempts to cross an arterial highway. *McCulley v. Anderson* 105

2. The jury should be instructed as to relative or reciprocal rights of motorists in accordance with an ordinance creating an arterial highway. *McCulley v. Anderson* 105

3. Where plaintiff in a personal injury action makes a *prima facie* case, the burden is on defendant to prove defense of contributory negligence. *McCulley v. Anderson* 105

4. Contributory negligence as a defense must be proximate to the injury. *McCulley v. Anderson* 105

5. Failure to instruct the jury on contributory negligence as a defense in a personal injury action may be erroneous even without a request for such an instruction. *McCulley v. Anderson* 105

6. Negligence and contributory negligence are questions for the jury, where different minds may reasonably draw different conclusions from the evidence. *Lieb v. Omaha & C. B. Street R. Co.* 222

7. Where there is evidence of negligence and contributory negligence, the court must give an instruction stating the comparative negligence rule. *Lieb v. Omaha & C. B. Street R. Co.* 222

8. The presumption of due care arising out of the instinct of self-preservation disappears when evidence on due care is produced. *Eggeling v. Chicago, R. I. & P. R. Co.* 229

9. Negligence in crossing a railroad track *held* more than slight, barring recovery under the comparative negligence law. *Eggeling v. Chicago, R. I. & P. R. Co.* 229

10. A driver must look backward while backing an automobile onto a highway, and must signal his intention to back when reasonably necessary. *Taulborg v. Andresen* 273

11. An instruction defining "proper lookout," as applied to backing an automobile onto a highway, *held* erroneous. *Taulborg v. Andresen* 273
12. One guilty of contributory negligence cannot recover for personal injuries unless his negligence is shown to be slight in comparison with defendant's negligence. *Peterson v. Millnitz* 365
13. A pedestrian before crossing a street intersection diagonally must look in every direction. *Peterson v. Millnitz* 365
14. Contributory negligence is for the jury, when there is a conflict of evidence. *Wortman v. Zimmerman* 682
15. Contributory negligence *held* for the jury under the comparative negligence statute. *Wortman v. Zimmerman* 682

New Trial.

1. Overruling a motion for a new trial for newly discovered evidence, being discretionary, will not be disturbed in absence of abuse thereof. *Blaha v. Chicago & N. W. R. Co* 611
2. Ordinarily, overruling of motion for new trial on ground of newly discovered evidence of a cumulative or impeaching character is not error. *Wortman v. Zimmerman* 682

Parent and Child.

A parent is entitled to custody of child as against a stranger, unless unfitness of the parent is alleged and proved. *In re Guardianship of Peterson* 511

Parties.

A civil action is maintainable in the name of the real party in interest. *Curnyn v. Kinney* 478

Partnership.

Priority of liens and order of payment out of partner's share of the net proceeds of the partnership determined. *Sacks v. Lytle* 642

Payment.

1. One paying a disputed demand voluntarily, with full knowledge of the facts, cannot ordinarily recover it back on the ground of its invalidity. *Meyer v. Rosenblatt & Son* 471
2. Instruction *held* not to present the law as to voluntary payments. *Meyer v. Rosenblatt & Son* 471

Physicians and Surgeons.

Verdict for $8,000 for malpractice *held* sustained by the evidence. *Sorensen v. Grand Island Clinic* 280

Pleading.

1. Material variance between allegations and proof precludes recovery. *Callaway v. Farmers Union Cooperative Ass'n* 1
2. If defendant relies on nonperformance of contract by plaintiff, he must allege that fact in his answer. *Morearty v. City of McCook* 202
3. Where a breach of contract is not such as to defeat a right of action, defendant cannot plead it in bar, but must plead it in recoupment of damages. *Morearty v. City of McCook* 202
4. Petition on motion to set aside satisfaction of judgment alleged to have been procured by fraudulent misrepresentations *held* not demurrable. *Marshall v. Rowe* 591
5. The issue of insolvency must be proved like any other controverted fact. *Vance v. Sumner* 630

Process. SEE MASTER AND SERVANT, 17, 18.

1. Affidavit for publication of service in an action to foreclose a tax lien *held* sufficient. *Jackman v. Miller* 463
2. Where the truthfulness of facts alleged in an affidavit for publication of service is challenged, the court must set the matter for hearing. *Jackman v. Miller* 463
3. Plaintiff *held* not to have made diligent investigation and inquiry as required for publication of service. *Jackman v. Miller* 463

Public Lands.

The United States in disposing of its public lands may describe them according to any surveys it has made. *Hickman v. Jones* 485

Quieting Title.

1. Conveyance by devisee before expiration of restrictive period *held* voidable, and not void. *Peters v. Northwestern Mutual Life Ins. Co* 161
2. Delay of devisee before bringing suit to quiet title to land conveyed by him before expiration of restrictive period *held* to bar right to set aside deed. *Peters v. Northwestern Mutual Life Ins. Co* 161
3. Mere delay, not exceeding the time limited by statute, will not bar a suit to quiet title, where defendant has not been prejudiced by the delay. *Geiss v. Trinity Lutheran Church Congregation* 745

Railroads.

1. Evidence *held* not to show reasonable excuse for a wagon driver's failure to stop, look, and listen before crossing railroad tracks. *Eggeling v. Chicago, R. I. & P. R. Co.* 229
2. The driver of an automobile struck by an engine at a crossing *held* guilty of negligence, precluding recovery. *Belz v. Chicago & N. W. R. Co.* 312
3. The diverting circumstance of a train passing an automobilist just previous to his being struck by a lone engine *held* not sufficient to take the case to the jury. *Belz v. Chicago & N. W. R. Co.* 312

Rape.

1. Evidence as to identity of accused *held* sufficient to take the issue to the jury. *Dodson v. State* 340
2. In an action for damages caused by an assault with intent to rape, an eye-witness may testify as to the appearance of plaintiff at the time as indicating fear. *Kubicek v. Slezak* 542

Receiving Stolen Goods.

1. Receiving or concealing stolen hogs, knowing them to have been stolen, with intent to defraud, is a substantive crime. *Norton v. State* 588
2. The word "conceals," in the law relative to receiving or concealing stolen hogs, includes the words "with intent to defraud." *Norton v. State* 588

Release.

1. Generally, one seeking to avoid the consequences of a release for personal injuries has the burden of proving that the release was fraudulently procured. *Blaha v. Chicago & N. W. R. Co.* 611
2. The false statement of a physician may be sufficient to avoid a release for personal injuries executed in reliance on the statement. *Blaha v. Chicago & N. W. R. Co.* 611

Religious Societies.

1. The constitution of a religious society is binding on its members, unless contrary to law or public policy. *Geiss v. Trinity Lutheran Church Congregation* 745
2. A bare majority of the congregation cannot alienate church property in violation of the church's constitution prohibiting alienation while three male members do not consent thereto. *Geiss v. Trinity Lutheran Church Congregation* 745

3. Members of a religious society holding title to church property are naked trustees, and a conveyance by them without consent of the society conveys no title to a grantee with knowledge of the society's equitable ownership. *Geiss v. Trinity Lutheran Church Congregation*.... 745
4. A controversy between two church societies belonging to different religious organizations as to title to and possession of a church building is for determination by the civil courts. *Geiss v. Trinity Lutheran Church Congregation* 745
5. Civil courts will exercise jurisdiction to protect property rights of religious societies. *Geiss v. Trinity Lutheran Church Congregation*..... 745

Sales.

1. The "Uniform Sales Act" prescribes rules of law governing every case coming within its provisions. *International Milling Co. v. North Platte Flour Mills*..... 325
2. The "Uniform Sales Act" must be so interpreted as to effectuate its general purpose to make uniform laws of states adopting it. *International Milling Co. v. North Platte Flour Mills*..... 325
3. A vendor or his assignee need not file a conditional sale contract to make it valid as against the vendee. *First Nat. Bank v. Newton*..... 394

Specific Performance.

1. One who has detrimentally altered his position relying on apparent abandonment of a contract will not, ordinarily, be required specifically to perform. *State, ex rel. Spillman, v. First State Bank*..... 39
2. Equity will not, ordinarily, require specific performance of a receiver's contract where serious doubt exists as to the court's power to approve the contract, and the other party may be prejudiced. *State, ex rel. Spillman, v. First State Bank*..... 39
3. Attorney's fees and expenses of litigation are not generally recoverable as damages resulting from breach of contract to sell and convey land. *Smoke v. Pope*..... 432
4. Petition for specific performance *held* not demurrable. *Long v. Osborn*..... 758

States.

On presentation of proper vouchers, the state auditor must draw warrants on the general fund and against the appropriation for the national guard. *Omaha Armory Bldg. Co. v. Johnson*..... 29

Statutes.

1. A statutory proviso should be strictly construed in the light of the act of which it forms a part and in furtherance of its purpose. *In re Heirship of Robinson*..... 285
2. An unconstitutional law imposes no duty and confers no authority on any one, and creates no obligation which can be enforced by subsequent legislation. *Anderson v. Lehmkuhl*..... 451
3. Chapter 106, Laws 1927, purporting to validate proceedings for formation of a light and power district, *held* invalid as special legislation. *Anderson v. Lehmkuhl*..... 451
4. A later act will not be construed as repealing a former act where they may stand together. *Liske v. State*..... 640

Stipulations.

Overruling an objection to introduction of affidavits in evidence *held* not error where the parties had agreed to their use. *Folts v. Globe Life Ins. Co*..... 143

Taxation.

1. The constitutional provision that foreign corporations shall not be given greater rights or privileges than domestic corporations refers to the granting of franchises and corporate privileges, rather than taxation. *State, ex rel. Beatrice Creamery Co., v. Marsh*..... 197
2. A pledge payable at death from pledgor's estate, not based on a fair and valuable consideration, but beneficent and donative, is subject to inheritance tax. *In re Estate of Wheeler*..... 344
3. Where a deed to land had not been recorded, affidavit in proceedings to foreclose a tax sale certificate, that the owner was unknown and the land was therefore made a party, conferred jurisdiction. *Jones v. Gibson*.... 574

Trial. SEE APPEAL AND ERROR. CRIMINAL LAW.

1. A compilation by a competent witness of original records, in court subject to inspection, *held* competent as against a general objection. *State, ex rel. Sorensen, v. Kistler* 89
2. Comments of the trial judge tending to discredit a witness may be prejudicially erroneous. *McCulley v. Anderson* 105
3. Where evidence on a controverted issue of fact is sufficient to support a verdict for defendant, a peremptory instruction for plaintiff is erroneous. *Farmers Grain, Lumber & Coal Co. v. Taylor*..... 216
4. One tendering an instruction which is given cannot thereafter assert there was no evidence tending to prove

facts assumed thereby. *Splittgerber Bros. v. Skinner Packing Co.* 259
5. Counsel should not make declarations of fact, nor repeat incompetent questions, nor make comment on evidence or witnesses until time for argument. *Splittgerber Bros. v. Skinner Packing Co.* 259
6. Where plaintiff in a personal injury action makes no attempt to show that defendant is not indemnified by insurance, it is not proper for defendant to show that he is not. *Taulborg v. Andresen* 273
7. All instructions or communications to the jury should be given in open court in the presence of the parties or their counsel. *Taulborg v. Andresen* 273
8. Refusal of a requested instruction is not erroneous, where the substance thereof is given in another instruction that is free from error. *Sorensen v. Grand Island Clinic* 280
9. An instruction summarizing the allegations of the pleadings and the issues *held* not necessarily erroneous as submitting unproved charges of negligence, in view of other instructions. *Sorensen v. Grand Island Clinic* .. 280
10. Where both parties request a direction of a verdict, they submit the case to the court on the issues of law arising on the facts as found by the court from the evidence. *First Nat. Bank v. Newton* 394
11. The trial court should not direct a verdict unless the evidence is so clear that reasonable minds cannot come to any other conclusion. *Vrbsky v. Arendt* 443
12. An instruction requiring a finding for defendant on proof of payment, in reliance on agreement to repay overpayments, *held* erroneous as assuming existence of the agreement. *Meyer v. Rosenblatt & Son* 471
13. Failure to instruct with reference to issues of account stated and accord and satisfaction tendered in reply and supported by evidence *held* error. *Meyer v. Rosenblatt & Son* 471
14. Where the evidence will support a verdict for plaintiff, it is error to give a peremptory instruction for defendant. *Allender v. Chicago & N. W. R. Co.* 559
15. A peremptory instruction against defendant is erroneous where the pleadings and proof are sufficient to sustain a verdict in his favor. *Security State Bank v. Schomberg* 598
16. Whether instructions produced misconception in minds of jury is determinable by considering all the instructions and the tendencies of the proof. *Blaha v. Chicago & N. W. R. Co.* 611

17. In a will contest, where competent evidence relating to mental capacity and undue influence is conflicting, the issues are for the jury. *In re Estate of Noren* 653
18. Error in instructions, or in failure or refusal to give instructions, not affecting substantial rights, will be disregarded. *In re Estate of Noren* 653
19. Instructions must be considered as a whole. *In re Estate of Noren* 653
20. Mere inexactness in the language of an instruction is not ground for reversal, where the jury were not misled. *In re Estate of Noren* 653
21. Where the evidence conflicts as to condition of a driveway to an elevator, the question is for the jury. *Luther v. Farmers Union Cooperative Ass'n* 676
22. A party desiring an instruction to guide the jury in weighing certain features of evidence must make request therefor at conclusion of the evidence and submit in writing the instruction desired. *Luther v. Farmers Union Cooperative Ass'n* 676
23. Error cannot be predicated on failure to instruct, without a request therefor, unless a statute or positive rule of law requires an instruction. *Luther v. Farmers Union Cooperative Ass'n* 676
24. The trial court may direct a verdict where the evidence will not support a conflict on questions of fact. *Lee v. Hildebrand* 717
25. Refusal of instructions covered by instructions given is not error. *Lewis v. Miller* 765
26. Instruction as to negligence of driver of automobile *held* properly refused as not supported by evidence. *Lewis v. Miller* 765

Trusts.

Evidence *held* insufficient to establish a trust in lands. *Clarke v. Marconnit* 581

Vendor and Purchaser.

1. Possession of land may be notice to the world of possessory rights of which inquiry of the occupant would elicit knowledge. *Smoke v. Pope* 432
2. Purchaser of land in possession of a third person is bound to inquire about the occupant's interest therein. *Smoke v. Pope* 432
3. One purchasing land with knowledge of another's previous contract to purchase it is not a purchaser in good faith. *Smoke v. Pope* 432

4. Equity may reform a contract for the purchase of land and require specific performance of the contract as reformed. *Smoke v. Pope* 432
5. Where vendee treats a contract of sale as a mortgage and forecloses, vendor is entitled to a stay. *Hawkins v. Mullen* 567

Venue.

Service of summons on a defendant residing in another county, and not jointly liable with those served, is not authorized. *First Nat. Bank v. Newton* 394

Waters.

1. The department of public works is invested with reasonable discretion. *State v. Oliver Bros* 302
2. "Abandonment" defined. *State v. Oliver Bros* 302
3. Defendant's negligence *held* not the proximate cause of injury. *Spurrier v. Mitchell Irrigation District* 401
4. Whether failure of an irrigation district to construct drains to take care of percolating water is negligence or wilfulness is a question of fact. *Spurrier v. Mitchell Irrigation District* 401
5. Statute *held* not to require an irrigation district to drain all nearby land seeped by percolating subterranean water; and the remedy therein provided is exclusive. *Spurrier v. Mitchell Irrigation District* 401
6. The owner of an irrigation canal is not as insurer against seepage, but is liable only for negligence and intentional wrongdoing. *Spurrier v. Mitchell Irrigation District* 401
7. One cannot recover for seepage, in absence of allegation and proof of negligence or wilful acts. *Spurrier v. Mitchell Irrigation District* 401
8. Irrigation districts are created to serve a public interest, and are common carriers. *Spurrier v. Mitchell Irrigation District* 401
9. Irrigation districts must furnish water to those entitled thereto under the appropriation at a reasonable and uniform price. *Spurrier v. Mitchell Irrigation District* 401
10. An irrigation district, being liable for failure to deliver water to a landowner entitled thereto, is not liable for injury resulting from lawful application of water to lands by the owners. *Spurrier v. Mitchell Irrigation District* 401
11. Irrigation is recognized and encouraged by the Constitution and statutes. *Spurrier v. Mitchell Irrigation District* 401

12. A landowner may irrigate his land artificially and he is not answerable to an adjoining landowner unless guilty of some negligent or wilful act, the proximate cause of damage. *Spurrier v. Mitchell Irrigation District* 401
13. Subterranean drainage from lawful irrigation is a burden the lower land must bear. *Spurrier v. Mitchell Irrigation District* 401

Wills.

1. In construing a will, the court will place itself in the position of the testator, ascertain his will, and, if lawful, enforce it. *Peters v. Northwestern Mutual Life Ins. Co.* 161
2. "Rules of law" mentioned in section 5594, Comp. St. 1922, relating to construction of wills, do not mean rules of construction in conflict with the intent of the testator. *Peters v. Northwestern Mutual Life Ins. Co* 161
3. Will construed and *held* to pass the fee simple title; and that the restriction on alienation was valid. *Peters v. Northwestern Mutual Life Ins. Co* 161
4. Whether there is a violation of restrictions against alienation of a fee simple title devised by will must be determined by the facts and law in each suit. *Peters v. Northwestern Mutual Life Ins. Co* 161
5. Where proponents have established a *prima facie* case of testator's sanity, contestants must rebut it. *In re Estate of Bayer* 191
6. Evidence *held* to establish testamentary capacity. *In re Estate of Bayer* 191
7. The burden is on contestants to prove undue influence. *In re Estate of Bayer* 191
8. If the evidence is insufficient to sustain a verdict for contestants on the issues of testamentary capacity and undue influence, the court should direct a verdict for proponents. *In re Estate of Bayer* 191
9. Devise to A and B "and their children, to be theirs forever," *held* to create them sole owners of the fee. *Bunting v. Richardson* 300
10. Bequest to testator's wife as long as she remained his widow *held* to vest a determinable fee, and not a conditional life estate. *Anderson v. Anderson* 381
11. A defeated litigant in a will contest is not entitled to a trial *de novo* on appeal to the supreme court. *In re Estate of Noren* 653

12. A confidential adviser who receives valuable property under the will of an aged person must overcome the presumption of undue influence. *In re Estate of Noren* 653
13. Instructions as to mental capacity and undue influence *held* not erroneous. *In re Estate of Noren* 653
14. Evidence of the financial condition of contestant is admissible in a will contest. *In re Estate of Noren* 653

Witnesses.

1. A party not objecting to taking testimony of a witness not under oath waives the objection. *Fetty v. State* 619
2. A qualified witness may express an opinion as to the speed of an automobile coming directly toward him. *Lewis v. Miller* 765
3. Refusal to permit a party to contradict his own witness *held* not an abuse of discretion. *Lewis v. Miller* 765
4. The statute authorizing interrogation of a witness as to previous conviction for felony does not limit the inquiry to a single conviction. *Sulley v. State* 783